TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 70

DR. JOHN HOPKINS, PLAINTIFF IN ERROR,

vs.

THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED SEPTEMBER 28, 1940.

(21,339.)

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THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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a The Supreme Court of the State of South Carolina.

DR. JOHN HOPKINS, Plaintiff-Appellant,

versus

THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, a Corporation Created by and existing under the Laws of the State of South Carolina, Defendant-Respondent.

The petition of Dr. John Hopkins respectfully shows as follows:

I.

That the above stated action was commenced in the Court of Common pleas for Oconee County on the first day of September 1905, and was for the sum of Eight thousand Dollars damages and to enjoin the defendant from maintaining a certain dike on the east side of Seneca River, which dike it was alleged caused the damage to plaintiff's lands.

II.

That issues having been joined, the said cause was tried on April 25th 1906 before his Honor Judge James Aldrich on the question of the jurisdiction of the Court; the defendant contending that the suit was practically a suit against the State, and that the consent of the State not having been obtained, suit could not be maintained, and resulted in a judgment dismissing the complaint upon that ground.

III.

That the said plaintiff appealed to the Supreme Court of South Carolina from the judgment entered in accordance with the said decree, which Court on the 23rd day of November 1906 filed its opinion and judgment affirming the judgment below, which opinion is reported in Volume 77 S. C. Reports at page 12. That
b thereafter a petition for rehearing of the said cause was filed and presented to the Court, which petition was dismissed by an order filed on January 27th 1907, and the said judgment became absolute.

IV.

That in the report of the said proceedings it appears that certain rights, privileges, and immunities claimed by the said plaintiff under the Constitution and laws of the United States were decided adverse to the petitioner, and especially the rights guaranteed in Article 5 of the amendment to the Constitution of the United States, which provides that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. And Article 14 of said amendment in the plaintiff's property was taken without due process of law and he was denied the equal protection of the laws.

That the exceptions filed to the decree of the Circuit Judge, and which were over ruled by the Supreme Court in its opinion, raised and presented the Federal questions in the said case, namely:

1. Whether the defendant had not taken private property for public use without just compensation.

2. Whether Defendant had not taken Plaintiff's property without due process of law.

3. Whether this suit was a case against the State, and which could not be maintained because the State had not consented to the suit

Wherefore the petitioner prays that a writ of error be allowed, whereby the judgment of this Court may be reviewed by the Supreme Court of the United States.

DR. JOHN HOPKINS,
By R. T. JAYNES, AND
JOS. A. McCULLOUGH,
His Attorneys.

Greenville, S. C., July 18, 1908.

c STATE OF SOUTH CAROLINA,
County of Greenville:

Personally comes Jos. A. McCullough, who upon oath says: that he is one of the attorneys for the plaintiff, Dr. John Hopkins, the petitioner herein, and that the foregoing petition is true to his own knowledge, his said knowledge being obtained from an inspection of the original records now before him.

JAS. A. McCULLOUGH.

Sworn to and subscribed before me this 18th day of July 1908.
OSCAR HODGES,
Notary Public for S. C.

The writ of error as prayed for in the foregoing petition is hereby allowed this the 24 day of July A. D. 1908. The writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Five hundred Dollars. Dated at Newberry, S. C., this 24th day of July A. D. 1908.

Y. J. POPE,
Chief Justice of the Supreme Court of the State of South Carolina.

Filed in my office this the 25th day of July, 1908.

[Seal Supreme Court of South Carolina, Nil Ultra.]

U. R. BROOKS,
Clerk of Supreme Court of the State of South Carolina.

[Endorsed:] United States of America. In the Supreme Court. Dr. John Hopkins, Plaintiff-Appellant, *versus* The Clemson Agricultural College of South Carolina, a corporation created by and existing under the laws of the State of South Carolina, Defendant-Respondent. Petition.

d STATE OF SOUTH CAROLINA:

In the Supreme Court.

Dr. JOHN HOPKINS, Plaintiff-Appellant,
versus
THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, a Corporation Created by and Existing under the Laws of the State of South Carolina, Defendant-Respondent.

The plaintiff, Dr. John Hopkins, in connection with his petition for a writ of error in the above stated case, makes the following assignments of error, which he alleges occurred upon the trial of the said cause, and in the judgment of the said Supreme Court, to wit:

I.

Error of the Supreme Court of South Carolina in overruling plaintiff's first exception to the judgment appealed from, which was as follows:

I. Because His Honor erred in finding and holding that the corporation created under the name of "The Clemson Agricultural College of South Carolina" is an agent of the State, and, as such, it cannot be sued; whereas he should have found and held that Defendant is a body politic and corporate, and capable of suing and being sued.

II.

Error of the Supreme Court of South Carolina in overruling plaintiff's second exception to the judgment appealed from, which was as follows:

II. Because His Honor erred in finding and holding that the Legislature of the State, in creating the defendant corporation with the usual powers and liabilities of a corporation, has not thereby given consent for said corporation to be sued.

III.

Error of the Supreme Court of South Carolina in overruling plaintiff's third exception to the judgment appealed from, which
e was as follows:

III. Because His Honor erred in finding and holding that under the charter the Trustees could sue and be sued only so far, and no farther, than was necessary to carry out the powers conferred upon the Board, and upon such contracts and obligations as they might make in pursuance of such power, and such permission does not warrant a suit of this nature.

IV.

Error of the Supreme Court of South Carolina in overruling plaintiff's fourth exception to the judgment appealed from, which was as follows:

IV. Because His Honor erred in finding and holding as follows: "This being an action for a tort, against the State, to recover eight thousand dollars, can not be maintained"; whereas, he should have found and held that this is an action against an artificial person, known and designated by the corporate name of "The Clemson Agricultural College of South Carolina," and capable of suing and being sued, in like manner as a natural person, for its unlawful act, either in its own right, or as agent of the State.

V.

Error of the Supreme Court of South Carolina in overruling plaintiff's fifth exception to the judgment appealed from, which was as follows:

V. Because His Honor erred in finding and holding that the property of the corporation is held by the Board of Trustees, as the agent of the State, and that said property is the property of the State; whereas, he should have found and held that said property is not the property of the State in its own right to be used for any political or governmental purpose; but the same is held, used and managed by the Board of Trustees for corporate purposes, to-wit: The founding and maintaining an institution of learning for which said donations and appropriations were made.

VI.

Error of the Supreme Court of South Carolina in overruling plaintiff's sixth exception to the judgment appealed from, which was as follows:

VI. Because, under the terms of the devise and bequest of Thomas G. Clemson and the Act of the General Assembly acc-pting said donation, and incorporating the College, a contract was entered into by and between testator and the State of South Carolina, whereby the entire corpus of the donation became a fund for the perpetual endowment of the institution, a private eleemosynary corporation was created, the contract became irrevokable, the Trustees exercise a special authority created by the will of testator and confirmed by the act of incorporation, and His Honor erred in not so holding.

VII.

Error of the Supreme Court of South Carolina in overruling plaintiff's seventh exception to the judgment appealed from, which was as follows:

VII. Because the use, income, rents and profits of the Fort Hill lands are enjoyed by the corporation, without accounting therefor, and while the technical title may be in the State, which is a mere trustee, the Defendant is the *cestui que trust*, the equitable owner thereof, and uses the rents, income and profits of said lands as its property, and His Honor erred in not so holding.

VIII.

Error of the Supreme Court of South Carolina in overruling plaintiff's eighth exception to the judgment appealed from, which was as follows:

VIII. Because the corporation, known and designated as "The Clemson Agricultural College of South Carolina," has no political or governmental powers, and cannot in a legal sense be considered an agent or officer of the State, and His Honor erred in not so finding and holding.

IX.

Error of the Supreme Court of South Carolina in overruling plaintiff's ninth exception to the judgment appealed from, which was as follows:

IX. Because the lands devised by testator, having been devoted by the terms of the devise to educational purposes; by the terms of the devise are held in trust for the use of the institution forever; the same is not property of the State; the Legislature cannot recall or revoke the devise or make any different disposition of the lands, nor sell the property and turn the funds into the State Treasury as the money or property of the State, and His Honor erred in not so holding.

X.

Error of the Supreme Court of South Carolina in overruling plaintiff's tenth exception to the judgment appealed from, which was as follows:

X. Because the 288 acres adjoining the Fort Hill place, conveyed by Floride Isabella Lee on May 25, 1894, to "The Clemson Agricultural College of South Carolina," is owned in fee and possessed by said corporation, and His Honor erred in not so finding and holding.

XI.

Error of the Supreme Court of South Carolina in overruling plaintiff's eleventh exception to the judgment appealed from, which was as follows:

XI. Because the tract of [30]* acres conveyed to "The Clemson Agricultural College of South Carolina" by Anna P. Lewis on the 30th day of June, 1903, is owned in fee and possessed by the said corporation, and His Honor erred in not so finding and holding.

XII.

Error of the Supreme Court of South Carolina in overruling plaintiff's twelfth exception to the judgment appealed from, which was as follows:

XII. Because the said corporation may purchase and hold property and may take any property or money given or conveyed by deed, devise or bequest and hold the same for the use and benefit of said College, and His Honor erred in not so finding and holding.

[*Figures enclosed in brackets erased in copy.]

XIII.

Error of the Supreme Court of South Carolina in overruling plaintiff's thirteenth exception to the judgment appealed from, which was as follows:

XIII. Because the rents, issues and profits of all lands donated to or purchased for the benefit of said College, are used by the corporation as corporate property, without accounting therefor, and His Honor erred in not so finding and holding.

XIV.

Error of the Supreme Court of South Carolina in overruling plaintiff's fourteenth exception to the judgment appealed from, which was as follows:

XIV. Because the will of testator and the charter by the State embody the terms of a binding contract between the parties, and the donations made by the testator as well as the appropriations made from time to time by the State, or Federal Governments, and expended in permanent improvements upon the real estate for the use of said College, are protected from any transfer, sale or disposition thereof by the State, in the slightest degree, contrary to or violative of the terms of the contract, or trust, and His Honor erred in not so finding and holding.

XV.

Error of the Supreme Court of South Carolina in overruling plaintiff's fifteenth exception to the judgment appealed from, which was as follows:

XV. Because the ordinary powers of a corporation are as follows: (1) Perpetual succession; (2) To sue and be sued, and to receive and grant, by their corporate name; (3) To purchase and hold lands and chattels; (4) To have a common seal; (5) To make by-laws. While these powers are generally expressly given by statute, still they are the usual inherent incidents of a corporation, and His Honor erred in not so holding.

XVI.

Error of the Supreme Court of South Carolina in overruling plaintiff's sixteenth exception to the judgment appealed from, which was as follows:

XVI. Because the creation by the Legislature of a body corporate impliedly confers upon it the power to sue and be sued so far as may be necessary to maintain its legal rights and to enforce its legal duties, or liabilities. In general it may be said that the power to sue and be sued is, by the principles of the common law, an incident of every corporation, and His Honor erred in not so holding.

XVII.

Error of the Supreme Court of South Carolina in overruling plaintiff's seventeenth exception to the judgment appealed from, which was as follows:

XVII. Because the ordinary legal remedies applicable in the case of natural persons are equally applicable in case of corporations, and His Honor erred in not so holding.

XVIII.

Error of the Supreme Court of South Carolina in overruling plaintiff's eighteenth exception to the judgment appealed from, which was as follows:

XVIII. Although an action cannot be brought against a sovereign State without its consent, yet if it chooses so far to cast off its sovereignty as to become a corporator, in that character it may be sued, and His Honor erred in not so holding.

XIX.

Error of the Supreme Court of South Carolina in overruling plaintiff's nineteenth exception to the judgment appealed from, which was as follows:

XIX. Where the law imposes an obligation upon a corporation, as well as upon a natural person, which it fails or refuses to recognize or discharge, it may be held civilly liable therefor, at law or in equity, in any appropriate form of action, and His Honor erred in not so holding.

XX.

Error of the Supreme Court of South Carolina in overruling plaintiff's twentieth exception to the judgment appealed from, which was as follows:

XX. A corporation can commit trespass upon either person or property, through its agents acting in its behalf, and it follows that an action will lie for such injury with the like remedies as in the case of a natural person, and His Honor erred in not so holding.

XXI.

Error of the Supreme Court of South Carolina in overruling plaintiff's twenty-first exception to the judgment appealed from, which was as follows:

XXI. Corporations may be held liable, in appropriate states of facts, for torts, commended or authorized by them, and His Honor erred in not so holding.

XXII.

Error of the Supreme Court of South Carolina in overruling plaintiff's twenty-second exception to the judgment appealed from, which was as follows:

XXII. Because the dike in question was erected and has been and is being maintained by the defendant corporation by and through the Board of Trustees acting in its behalf, and His Honor erred in not so finding and holding.

XXIII.

Error of the Supreme Court of South Carolina in overruling plaintiff's twenty-third exception to the judgment appealed from, which was as follows:

XXIII. When the State becomes a corporator it is regarded as an individual, in relation to the corporation. What an individual corporator may do the State, as a corporator, may do, and no more, and His Honor erred in not so holding.

XXIV.

Error of the Supreme Court of South Carolina in overruling plaintiff's twenty-fourth exception to the judgment appealed from, which was as follows:

XXIV. A private eleemosynary corporation can enjoy no privilege, immunity or exemption by reason of its connection with the State, other than a corporation composed of private citizens, and His Honor erred in not so holding.

XXV.

Error of the Supreme Court of South Carolina in overruling plaintiff's twenty-fifth exception to the judgment appealed from, which was as follows:

XXV. The State, in its sovereign capacity, is distinct and separate from a corporation: When it establishes a corporation, with the usual corporate powers, for any purpose, be it educational, benevolent, charitable, industrial, financial or governmental, it does not invest the corporation with any of its sovereign power or immunity, and His Honor erred in not so holding.

XXVI.

Error of the Supreme Court of South Carolina in overruling plaintiff's twenty-sixth exception to the judgment appealed from, which was as follows:

XXVI. Because the various Acts of the General Assembly conferring corporate powers upon "The Clemson Agricultural College of South Carolina," create three different types of corporations, to-wit: (*a*) a private eleemosynary corporation for educational purposes, by Act approved November 27, 1889; (*b*) a municipal corporation, by Act approved December 24, 1894; (*c*) a railroad corporation, subject to all liabilities of railroad corporations, by Act approved February 19, 1900; and His Honor erred in not so finding and holding.

XXVII.

Error of the Supreme Court of South Carolina in overruling plaintiff's twenty-seventh exception to the judgment appealed from, which was as follows:

XXVII. Because the several Acts of the Legislature conferring corporate powers upon "The Clemson Agricultural College of South

Carolina" clothe said corporation with the usual powers, responsibilities and liabilities incident to such corporations, and in the face of these statutes it was error for His Honor to hold as follows: "The 'sue and be sued' provision in the charter of Defendant relates to such powers as were conferred upon the Trustees by the Act, and the Legislature did not throw the State open to any and all kind of suits. Under the charter the Trustees could sue and be sued only so far and no farther, than was necessary to carry out the powers conferred upon the Board, and upon such contracts and obligations as they might make in pursuance to such power."

XXVIII.

Error of the Supreme Court of South Carolina in overruling plaintiff's twenty-eighth exception to the judgment appealed from, which was as follows:

XXVIII. Because the defendant corporation, acting by and through its Board of Trustees, erected and maintained the dike in question, and if injury and damage ensue therefrom to the lands of Plaintiff, an action therefor will lie against the corporation in like manner as against a natural person, and His Honor erred in not so finding and holding.

XXIX.

Error of the Supreme Court of South Carolina in overruling plaintiff's twenty-ninth exception to the judgment appealed from, which was as follows:

XXIX. Because the injurious acts alleged in the complaint are the acts of the defendant corporation, acting by and through the Board of Trustees as its agent, and not by the Trustees individually, singly or collectively; and, when action is brought against the corporation for such injury and damage, it is incumbent upon the corporation to defend and justify such act, if it can, in like manner as a natural person must do; and, unless a natural person acting as the defendant corporation is alleged to have acted, could defend and justify by invoking some constitutional right or statute, the issue joined must be heard and determined by the Court, and His Honor erred in not so finding and holding.

XXX.

Error of the Supreme Court of South Carolina in overruling plaintiff's thirtieth exception to the judgment appealed from, which was as follows:

XXX. A defendant, whether natural or corporate, sued as a wrong-doer, who seeks to substitute the State in his or its place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his or its act and exonerated him or it, cannot rest on the bare assertion of such defense. It is necessary for such a defendant, in order to complete his defense, to produce a valid law of the State as a warrant of his or its act, and His Honor erred in not so holding.

XXXI.

Error of the Supreme Court of South Carolina in overruling plaintiff's thirty-first exception to the judgment appealed from, which was as follows:

XXXI. Because Article III, Section 17, of the State Constitution of 1895, provides: "Every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title;" the Joint Resolution approved January 14, 1894, which it is claimed authorizes the diking of Seneca River, is entitled as follows: "A Joint Resolution to authorize and require the Directors of the Penitentiary to furnish to the Trustees of The Clemson Agricultural College fifty convicts, and to furnish to the Regents of the Lunatic Asylum fifty convicts, and to furnish to the Trustees of the South Carolina Industrial and Winthrop Normal College one hundred convicts;" and so much of said joint resolution as relates to the diking of Seneca River by said Trustees with the work of said convicts violates this provision, and is unconstitutional, null and void; cannot be invoked as a Legislative Act, or declaration, authorizing or directing the diking of Seneca River by the said Board of Trustees, whether acting as agents of the State, or as agents of the corporation, and His Honor erred in not so finding and holding.

XXXII.

Error of the Supreme Court of South Carolina in overruling plaintiff's thirty-second exception to the judgment appealed from, which was as follows:

XXXII. Because Article I, Section 5, of the State Constitution of 1895 guarantees that no person shall be deprived of his property without due process of law. A person may be deprived of his property without any physical taking thereof, and this provision of the Constitution is violated by any Act which destroys the value of property, takes away any of its essential attributes, or deprives the owner of the lawful use of it; and, a properly entitled Act or resolution of the General Assembly, authorizing or directing a course of action, which results in any such depriving of the owner of his property, would be unconstitutional, null and void, and could furnish no defense in law or equity; and His Honor erred in not so holding.

XXXIII.

Error of the Supreme Court of South Carolina in overruling plaintiff's thirty-third exception to the judgment appealed from, which was as follows:

XXXIII. Because the Fourteenth Amendment to the Constitution of the United States provides: "Nor shall any State deprive any person of life, liberty or property without due process of law." The allegations of the complaint show that Plaintiff has been deprived of his property for all practical purposes as agricultural lands as effectually as if there had been a physical taking thereof; that Plaintiff has thus been deprived of his property by the defendant corporation, acting by and through its Board of Trustees, and this constitutional

XXXIV.

Error of the Supreme Court of South Carolina in overruling plaintiff's thirty-fourth exception to the judgment appealed from, which was as follows:

XXXIV. Because the objection that this is an action against the State is inconsistent with the principle involved in Article 5 of the Amendments to the Constitution of the United States, providing, "That no person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation," and His Honor erred in not so holding.

XXXV.

Error of the Supreme Court of South Carolina in overruling plaintiff's thirty-fifth exception to the judgment appealed from, which was as follows:

XXXV. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. Whatever wrong may be attempted in the name of the State is imputable to its agency, the government, and not to the State; for as it can speak and act only by law, whatever it does, say or do must be lawful. That which, therefore, is unlawful, because made so by the supreme law, the Constitution of the United States, is not a word or deed of the State, but is the mere wrong and trespass of those persons, whether natural or artificial, who falsely speak and act in its name. The principles of individual liberty and right of property cannot be maintained if, when violated, the judicial tribunals are forbidden jurisdiction in actions brought against the offenders, whether natural or artificial, who are the instruments of wrong, because they interpose the shield of the State, and His Honor erred in not so holding.

XXXVI.

Error of the Supreme Court of South Carolina in overruling plaintiff's thirty-sixth exception to the judgment appealed from, which was as follows:

XXXVI. The objection is that, as the State cannot be brought before the Court, this suit cannot be sustained against the defendant corporation, the alleged agent of the State; whereas, even if the defendant corporation be the agent of the State, and the State be exempt from judicial process, it would still be subversive of the best established principles to say that the law cannot afford the same remedies against the agent employed in doing the wrong, which it would afford against him could his principle be joined in the suit; and His Honor erred in not so holding.

XXXVII.

Error of the Supreme Court of South Carolina in overruling plaintiff's thirty-seventh exception to the judgment appealed from, which was as follows:

XXXVII. An action against a corporation cannot be regarded or treated as an action against the corporator or party owning its stock or property. When an artificial person, called a corporation, is brought into existence, it, like all other persons, natural as well as artificial, may be subjected to the process of the Courts, and the fact that its property is owned in part or in whole by the State, confers upon it no exemption from suit, as the corporation and the person or persons, whether natural or artificial, who compose it, are totally distinct and different; and His Honor erred in not so holding.

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XXXVIII.

Error of the Supreme Court of South Carolina in overruling plaintiff's thirty-eighth exception to the judgment appealed from, which was as follows:

XXXVIII. Because the moneys appropriated from time to time by the General Assembly are for the use of the corporation and devoted as a trust or corporate fund to the carrying out of its business as an educational institution under the direction and control of the Board of Trustees, as a corporate body; and for any act of said Board in the performance of its duty resulting in unlawful injury to the rights of person or property of another, such fund would be answerable to and could be reached by the ordinary process of the Courts in actions brought for redress of such wrongs, and His Honor erred in not so holding.

XXXIX.

Error of the Supreme Court of South Carolina in overruling plaintiff's thirty-ninth exception to the judgment appealed from, which was as follows:

XXXIX. It does not follow, that, because the State makes annual appropriations to assist the defendant corporation in maintaining an institution of learning in accordance with the will of Thomas G. Clemson, and to make certain that its bounty shall not be misapplied, requires annual reports to the General Assembly by the Board of Trustees, showing receipts and disbursements, said corporation is exempt from suit, and His Honor erred in not so holding.

XL.

Error of the Supreme Court of South Carolina in overruling plaintiff's fortieth exception to the judgment appealed from, which was as follows:

XL. To grant the relief prayed for in the complaint would not have the effect of clogging the wheels of one of the branches of the State government, nor interfere with the State in the discharge of any of its political or governmental functions. The State is not an indispensable party to the issue raised; in no way can it be affected by the determination of either the legal or equitable cause of action set out in the complaint, and His Honor erred in not so holding.

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XLI.

Error of the Supreme Court of South Carolina in overruling plaintiff's forty-first exception to the judgment appealed from, which was as follows:

XLI. Because His Honor erred in finding and holding as follows: "There can be no complete determination of the controversy at bar without the presence of the State; because a complete determination, should the Plaintiff prevail, would result in an injunction against the use of the dike, and its removal, and a restoration of former conditions"; whereas, he should have found and held that there can be a complete determination of the controversy without the presence of the State; that such order of injunction, if issued, would require the corporation acting by and through its Board of Trustees, who erected the dike, to remove the same and restore the condition as they found it prevailing at the time of their unlawful act of constructing the same.

XLII.

Error of the Supreme Court of South Carolina in overruling plaintiff's forty-second exception to the judgment appealed from, which was as follows:

XLII. Because His Honor erred in finding and holding that said dike is the property of the State; whereas, he should have found and held that the dike is the property of defendant corporation.

XLIII.

Error of the Supreme Court of South Carolina in overruling plaintiff's forty-third exception to the judgment appealed from, which was as follows:

XLIII. Because it was error for His Honor to find and hold as follows: "It is also evident, that all property held by the Board of Trustees, as the agent of the State, is the property of the State;" whereas, he should have found and held that the property held by said Board of Trustees, except such personal property as has been purchased by them with moneys appropriated by the State, is the property of the defendant corporation; that the State is a mere trustee, holding said property for the use of the corporation.

XLIV.

Error of the Supreme Court of South Carolina in overruling plaintiff's forty-fourth exception to the judgment appealed from, which was as follows:

p XLIV. Because it was error for His Honor to find and hold that the property of the State must respond to any judgment for damages which could be given in this action; because the Board has no other property out of which the judgment might be satisfied; whereas, he should have found and held that there is property of the corporation far in excess of the amount of any judgment for damages which could be rendered in this action.

XLV.

Error of the Supreme Court of South Carolina in overruling plaintiff's forty-fifth exception to the judgment appealed from, which was as follows:

XLV. Because it was error for His Honor to find and hold that the State in its sovereignty has not consented to be a party to this suit; whereas, he should have found and held that the State, by creating said corporation and clothing it with the usual corporate powers, and liabilities, and expressly declaring that it may sue and be sued, has thereby granted and given all necessary and requisite consent that suit may be brought, without a grant of further consent.

XLVI.

Error of the Supreme Court of South Carolina in overruling plaintiff's forty-sixth exception to the judgment appealed from which was as follows:

XLVI. Because a suit against an officer or agent of a State to enjoin the enforcing of an unconstitutional statute whereby the Plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, is not an action against the State, and His Honor erred in not so holding.

XLVII.

Error of the Supreme Court of South Carolina in overruling plaintiff's forty-seventh exception to the judgment appealed from, which was as follows:

XLVII. Because, if a State by its officers or agents should seize for public use, or for the use of the State, the property of a citizen, without making or securing just compensation to him, and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law, the citizen would be remediless so long as the State, by its agents, chooses to hold his property, and His Honor erred in not so holding.

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XLVIII.

Error of the Supreme Court of South Carolina in overruling plaintiff's forty-eighth exception to the judgment appealed from, which was as follows:

XLVIII. While it is true that even in case of seizure, injury or damage to the property of the citizen by an officer or agent of the State, the citizens may, if he choose, rely upon the good faith of the State in the matter of compensation; still he is not compelled to part with his property, even for the use or benefit of the State, or sustain injury thereto, except upon the terms prescribed by the supreme law of the land, namely, upon just compensation made or secured, and His Honor erred in not so holding.

XLIX.

Error of the Supreme Court of South Carolina in overruling plaintiff's forty-ninth exception to the judgment appealed from, which was as follows:

XLIX. An action, whether brought to recover money or property in the hands of an officer or agent of a State, unlawfully taken by him in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong or injury, is not, within the meaning of the Constitution, an action against the State, and His Honor erred in not so holding.

L.

Error of the Supreme Court of South Carolina in overruling plaintiff's fiftieth exception to the judgment appealed from, which was as follows:

L. That Article I, Section 17, of the State Constitution of 1895 provides: "Private property shall not be taken for private use without consent of the owner, nor for public use without just compensation being made therefor;" that this provision of the Constitution has been violated by the act of the defendant corporation without consent of Plaintiff and without just compensation having been made to Plaintiff by Defendant, and His Honor erred in not so holding.

LI.

Error of the Supreme Court of South Carolina in overruling plaintiff's fifty-first exception to the judgment appealed from, which was as follows:

LI. Because, even if the defendant corporation be considered in a legal sense an agency of the State, still the action of Defendant in erecting and maintaining the dike has thereby created a continuing nuisance resulting in injury and damage to lands of Plaintiff, for which an action will lie against Defendant for such unlawful and injurious act, even though action will not lie against the State for the unlawful act of the agent, and His Honor erred in not so holding.

LII.

Error of the Supreme Court of South Carolina in overruling plaintiff's fifty-second exception to the judgment appealed from, which was as follows:

LII. Because the State will not suffer one of its citizens to be injured in his property, or deprived thereof, by an unlawful act of an agent, who in such transaction becomes a false representative of the principal, and, therefore, while the State cannot be sued, still it cannot countenance wrong, and, for this reason, the citizen is permitted to sue the agent of the State for the commission of an unlawful, or unconstitutional act, resulting in damage and injury to property, or the depriving thereof, and His Honor erred in not so holding.

LIII.

Error of the Supreme Court of South Carolina in overruling plaintiff's fifty-third exception to the judgment appealed from, which was as follows:

LIII. Because His Honor confused the right of action against Defendant with the remedy, or the want of a remedy, for the enforcement of a judgment for damages, should Plaintiff succeed in recovery of such judgment; whereas it matters not whether the defendant corporation has or has not any property out of which a money judgment might be enforced by levy and sale under execution, the question as to the enforcement of a judgment being no part of Plaintiff's cause of action, and His Honor erred in not so holding.

LIV.

Error of the Supreme Court of South Carolina in overruling plaintiff's fifty-fourth exception to the judgment appealed from, which was as follows:

s LIV. Because the allegations of the complaint show the creation of a nuisance by the defendant corporation, whether acting for itself in its own right, or as an agent of the State, and that said nuisance has been and remains a continuous one, resulting in continuous and increasing damage and injury to the property of Plaintiff, a proper case is thereby shown for the invoking of equitable relief by the removal of said dike, and preventing the continuance of said nuisance by the abatement thereof, and His Honor erred in not so holding.

LV.

Error of the Supreme Court of South Carolina in overruling plaintiff's fifty-fifth exception to the judgment appealed from, which was as follows:

LV. Because, even if the State be the owner in fee and in possession of all the property, real and personal, devised and bequeathed by Thomas G. Clemson, still said property cannot be used by any officer, agent, or agency of the State, in such a manner as to inflict damage and injury upon the property of a citizen, whereby the value of such property is *depected* the use thereof impaired, or the owner *depreciated* of his property without just compensation; and in such case action will lie against the officer, agent, or corporate agency of the State through whose act the damage and injury be inflicted, for redress of such wrong, and His Honor erred in not so holding.

LVI.

Error of the Supreme Court of South Carolina in overruling plaintiff's fifty-sixth exception to the judgment appealed from, which was as follows:

LVI. If officers or agents of the State invade the private right of property in a mode not authorized by statute, or if such statute be invalid, the person injured has a preventive remedy by injunction, although the State may be affected thereby, yet not a party of the action, and His Honor erred in not so holding.

t LVII.

Error in holding that the defendant here is a public corporation; the undisputed testimony showing that the said institution was originally founded by the benevolence of a private individual, and is a private corporation.

LVIII.

Error in holding that there is no special statute of this State authorizing a suit against The Clemson Agricultural College of South Carolina for tort, the charter creating the said Clemson Agricultural College providing that it might "sue and be sued."

LIX.

Error in holding "thus it is manifest that the State has such an interest in this suit, that its presence as a party is imperatively necessary. The State has not consented to be a party." The record showing:

(*a*) That the State in its sovereign capacity is not interested in the said controversy, and is not a necessary party.

(*b*) If it were, when it provided in the charter of the said corporation that it might "sue and be sued," permission was thereby given.

(*c*) That in doing the acts complained of in the complaint, it was not exercising an attribute of sovereignty, and, therefore, could not claim the protection.

R. T. JAYNES,
JOS. A. McCULLOUGH,
Attorneys for Dr. John Hopkin.

u [Endorsed:] United States of America. In the Supreme Court. Dr. John Hopkins, Plaintiff-Appellant, *versus* The Clemson Agricultural College of South Carolina, a corporation created by and existing under the laws of the State of South Carolina, Defendant-Respondent. Assignments of Error.

v *Bond on Writ of Error from Supreme Court of United States to State Court.*

In re Dr. John Hopkins, Plaintiff in Error,
versus
The Clemson Agricultural College of South Carolina, a Corporation Created by and Existing under the Laws of the State of South Carolina, Defendant in Error.

Know all men by these presents, that we, Dr. John Hopkins as principal and Eugenia P. Lowry as surety are held and firmly bound unto The Clemson Agricultural College of South Carolina, a corporation created by and existing under the laws of the State of South Carolina in the sum of Five Hundred Dollars to be paid to the said

obligees, their successors, representatives, and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of July A. D. 1908.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of South Carolina.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

w JOHN HOPKINS. [SEAL.]
EUGENIA P. LOWRY. [SEAL.]

Signed, sealed and delivered in the presence of
F. S. HOLLEMAN.
J. T. LAURENCE.

Approved by
Y. J. POPE,
Chief Justice of the Supreme Court of South Carolina.

STATE OF SOUTH CAROLINA,
County of Oconee:

Eugenia P. Lowry, one of the subscribers to the foregoing undertaking, being sworn, says: That she is a resident and freeholder within this State, and is worth the sum of Five Hundred Dollars, over all her debts and liabilities, and exclusive of property exempt by law from execution.

EUGENIA P. LOWRY.

Sworn to before me this 29th day of July, A. D. 1908.
[SEAL.] F. S. HOLLEMAN,
Notary Public, S. C.

x [Endorsed:] United States of America. In the Supreme Court. Dr. John Hopkins, Plaintiff-Appellant, *versus* The Clemson Agricultural College of South Carolina, a corporation created by and existing under the laws of the State of South Carolina, Defendant-Respondent. Bond.

y The Supreme Court of the United States of America, to The Clemson Agricultural College of South Carolina, a corporation created by and existing under the laws of the State of South Carolina, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the City of Washington, on the 25 day of Aug. 1908, pursuant to writ of error filed in the Clerk's office of the Supreme Court of South Carolina,

wherein Dr. John Hopkins is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 25th day of July, in the year of our Lord one thousand nine hundred and eight and in the Independence of the United States of America one hundred and thirty-third.

Y. J. POPE.
Chief Justice of the Supreme Court of the State of South Carolina.

z [Endorsed:] United States of America. In the Supreme Court. Dr. John Hopkins, Plaintiff-Appellant, *versus* The Clemson Agricultural College of South Carolina, a corporation created by and existing under the laws of the State of South Carolina, Defendant-Respondent. Citation. Due legal personal service of within citation acknowledged at Columbia, S. C., this the 2 day of September 1908. Simpson, Casey & Billinger, Att'ys of record.

aa UNITED STATES OF AMERICA:

In the Supreme Court.

DR. JOHN HOPKINS, Plaintiff in Error,
versus
THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, a Corporation Created by and Existing under the Laws of the State of South Carolina, Defendant in Error.

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of South Carolina, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Dr. John Hopkins and The Clemson Agricultural College of South Carolina, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of

said constitution, treaty, statute, or commission, a manifest
bb error hath happened, to the great damage of the said Dr. John Hopkins, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the — day of ——, 1908, in the said supreme court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

[Seal U. S. Circuit Court, District of So. Carolina.]

C. J. MURPHY,
Clerk of Circuit Court of the United States for District of South Carolina.

Allowed by

Y. J. POPE,
Chief Justice of the Supreme Court of the State of South Carolina.

cc [Endorsed:] United States of America. In the Supreme Court. Dr. John Hopkins, Plaintiff-Appellant, *versus* The Clemson Agricultural College of South Carolina, a corporation created by and existing under the laws of the State of South Carolina, Defendant-Respondent. Writ of error.

dd STATE OF SOUTH CAROLINA,
County of Oconee:

In the Supreme Court, Tenth Circuit, April Term, 1906.

Appeal from Oconee County, March Term, 1906—James Aldrich, Presiding Judge.

Dr. JOHN HOPKINS, Plaintiff-Appellant,
against
THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, a Corporation Created by and Existing under the Laws of the State of South Carolina, Defendant-Respondent.

R. T. Jaynes, Attorney for Plaintiff.
Simpson & Hood, Bellinger & Welch, James P. Carey, Attorneys for Defendant.

Agreed Case.

1 STATE OF SOUTH CAROLINA,
County of Oconee.

In the Supreme Court, Tenth Circuit, April Term, 1906.

Appeal from Oconee County, March Term, 1906, James Aldrich, Presiding Judge.

DR. JOHN HOPKINS, Plaintiff-Appellant,
against
THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, a Corporation Created by and Existing Under the Laws of the State of South Carolina, Defendant-Respondent.

R. T. Jaynes, Attorney for Plaintiff.
Simpson & Hood, Bellinger & Welch, James P. Carey, Attorneys for Defendant.

Agreed Case.

The above entitled action was commenced on the 1st day of September, 1905, by the service of summons and complaint.

2 *Amended Complaint.*

The Plaintiff, amending his complaint in the above entitled action by leave of the Court first had and obtained, respectively shows:

First. That the Defendant, The Clemson Agricultural College of South Carolina, at the times hereinafter was and still is a corporation created by and existing under the laws of the State of South Carolina, and as such authorized to sue and be sued, plead and be impleaded in the courts of the State in its corporate name aforesaid; that said corporation is managed and maintained by a Board of Trustees, who are duly declared to be a body politic and corporate under the name and style of "The Clemson Agricultural College of South Carolina"; that said Board of Trustees could, at the times hereinafter mentioned, and still may sue and be sued, plead and be impleaded in their corporate name aforesaid under and by virtue of the laws of the State.

Second. That Plaintiff is the owner in fee simple and in possession of the following described tracts of land, to-wit: All that certain piece, parcel or tract of land situate, lying and being in the County of Oconee, of the State of South Carolina, on the West side of Seneca River, adjoining lands of Dr. J. H. Burgess, Eugenia P. Lowery and others, containing one hundred and thirty-three (133) acres, more or less, the same being more fully represented by plat thereof made by M. S. McCay, surveyor, on the 28th day of November, 1871, and being one of the two tracts of land conveyed to Dr. John Hopkins by Margaret Frances Mallonee by deed, bearing date the 9th day of

January, 1880, recorded in the office of Register of Mesne Conveyance, of Oconee County, on the 19th day of January, 1880, in Book "F," pages 570 and 571; also all that certain other piece, parcel or tract of land adjoining tract aforesaid, containing one hun-
3 dred and fifty acres, more or less, and more fully represented by plat of same made by M. S. McCay, surveyor, on the 4th day of September, 1871, the same having been conveyed to Dr. John Hopkins by the said Margaret Frances Mallonee by the deed aforesaid, the two tracts of one hundred and thirty-three and one hundred and fifty acres, adjoining each other and constituting together one tract of two hundred and eighty-three acres, more or less, which has been owned by Plaintiff and in his possession ever since the 9th day of January, 1880, and used and treated by Plaintiff, as one entire plantation or tract of land, for agricultural purposes.

Third. That forty-two acres of the tract of one hundred and thirty-three acres aforesaid is bottom land, situate, lying and being on or along the West side of Seneca River aforesaid, of which bottom land, Plaintiff is seized in fee and possessed, and has been so seized and possessed ever since the 9th day of January, 1880, aforesaid; that during all this time the said forty-two acres of bottom land has been used for agricultural purposes; that at the time of the purchase thereof by Plaintiff the said bottom lands were exceedingly fertile and well adapted to the cultivation and growth of crops of corn; that the yield of such crops on said bottom lands for many years was very great; that the condition and fertility of said bottom lands continued to improve after the purchase by Plaintiff, and continued so to do for several years and until the erection of a large dike on the East bank of the Seneca River as hereinafter mentioned; that since the erection and maintenance of said dike Plaintiff's bottom land aforesaid has gradually deteriorated in value for agricultural purposes until at the present time it is practically ruined and almost entirely worthless for agricultural purposes.

Fourth. That on or about the year of 1894 and 1895 the Defendant, by and through its Board of Trustees aforesaid, constructed on its lands, situate, lying and being on the East side of Seneca
4 River and opposite the bottom lands of Plaintiff aforesaid a very large, high and strong embankment or dike, said embankment or dike being located immediately along the East bank of Seneca River, opposite Plaintiff's bottom land aforesaid; that said embankment or dike was constructed by Defendant, by and through its Board of Trustees aforesaid, for the purpose of preventing the overflow of the waters of Seneca River on its bottom lands in the rear of the said embankment or dike in times of freshets or floods caused by excessive rains in the head waters of Seneca River aforesaid; that said embankment or dike was constructed by Defendant, by and through its Board of Trustees aforesaid, about ten years ago and has been maintained by Defendant, by and through its Board of Trustees aforesaid, ever since, and still is maintained by Defendant, by and through its Board of Trustees aforesaid, for the purpose aforesaid; that said embankment or dike has been built so high and broad and strong that it prevents entirely the natural and accustomed overflow of the waters of said Seneca River on the bottom

lands of Defendant on the East side of Seneca River in times of freshets; that before the construction of said dike the waters of Seneca River, in times of freshets, were accustomed to overflow the said bottom lands of Defendant on the East side of Seneca River and spread out over said lands to a great distance as well as over the bottom lands of Plaintiff aforesaid; that since the construction of said dike the entire volume of the waters of the Seneca River in times of freshets is thrown on Plaintiff's side and forced to flow with great volume and momentum in a comparative narrow channel on, over and across Plaintiff's bottom land aforesaid, whereby the natural bank on Plaintiff's side has been washed and torn away in many places and the rich soil on Plaintiff's bottom land washed away; that by reason of the erection and maintenance of said dike Defendant, by and through its Board of Trustees aforesaid, has caused such injury and damage to said bottom lands of Plaintiff; that prior to the construction of said dike Plaintiff's bottom lands were benefited by the deposit of alluvial soil during the times of freshets, as the waters were very nearly eddy and flowed sluggishly over said bottom lands and left a rich deposit thereon, whereby said lands were benefited instead of injured during freshets; that since the construction of said dike this condition has been reversed and the waters thrown by Defendant's dike wholly on Plaintiff's land, thereby entailing the damage and injury aforesaid; that Plaintiff's bottoms, once so rich, fertile and productive, have been practically ruined and rendered sterile, to Plaintiff's damages in the sum of eight thousand dollars.

Fifth. That during the period aforesaid said injury has been, and still is, continuous from day to day and from year to year.

Wherefore, Plaintiff demands judgment against Defendant: (1) For the sum of eight thousand dollars and the cost of this action. (2) That Defendant be enjoined by the proper order of this Court to abate and remove said dike and restore the condition prevailing and existing prior to the construction of said dike. (3) For such other and further relief as to the Court may seem meet and proper.

R. T. JAYNES,
Plaintiff's Attorney.

Answer.

The Defendant above named, answering the amended complaints herein, alleges:

1. That it denies each and every allegation in the complaint contained.

2. That the title of the land upon which the dike referred to in the complaint was erected or built is now and has been since March 6, 1890, in the State of South Carolina, and said State is in the possession thereof and has been since March 6, 1890, when the said land was conveyed to it.

3. That the Defendant, the Clemson Agricultural College of South Carolina, since the establishment of said College, has simply had the management of the said property belonging as alleged herein to the State of South Carolina, and never had or now have any interest

or title whatsoever to the land described in the complaint and any other property connected with the establishment and maintenance of The Clemson Agricultural College of South Carolina is the property of the State of South Carolina.

4. That about the year 1894 the dike mentioned in the complaint was built by the State of South Carolina, upon its own property, and the Defendant, the Clemson Agricultural College of South Carolina, simply acted as the agent of said State in the erection and maintenance of said dike, which was duly authorized by said State.

Wherefore, the Defendant prays that the complaint may be dismissed with cost.

SIMPSON & HOOD,
BELLINGER & WELCH,
JAMES P. CAREY,
Attorneys for Defendant.

Testimony.

It is understood and agreed, that Messrs. Bellenger & Welch shall furnish the Judge with a copy of their points and authorities, and to the Plaintiff's Attorney a copy thereof, who shall have the right to reply thereto within five days from the time he receives the same.

The following papers were introduced in evidence by Mr. Carey:

Will of Thomas G. Clemson and codicile thereto; Act of the Legislature accepting the Clemson bequest; deed from Richard W. Simpson, Executor of the last will and testament of Thomas G.
7 Clemson, to the State of South Carolina; joint resolution of the General Assembly, authorizing Clemson College to purchase land belonging to Miss Lee; deed from Ella L. Lee to Clemson College; deed from Floride Isabella Lee to Clemson College; deed from Anna P. Lewis to Clemson College; resolution of the General Assembly regulating all funds arising from the Clemson bequest, in the hands of the State Treasurer; Act providing for the building and maintenance of Clemson Agricultural College, involving the Hatch and Land Scrip funds in the hands of the six State Trustees; Section 1299 of the Code of 1902, Volume 1, as to the Morrill Fund; Act involving the duty of the State Board of Agriculture upon the Board of Trustees of Clemson College, and appropriating the privilege tax; Act providing for the selling of the Agricultural Hall and Experiment Hall, and the appropriation of the proceeds thereof; Act regulating the mode of drawing money appropriated to the State institutions, contained in Section 724, of the Code of 1892; Law of Congress relating to Clemson Agricultural College of South Carolina and its funds; extracts from the minutes of the Executive Committee of the College and Executive Committee; extracts from the minutes of the Executive Committee; Act of the Legislature, furnishing the trustees with fifty convicts to be used in diking Seneca River; extracts from the minutes of the Board of Trustees relating to the dike; extracts from the minutes of the Board of Trustees as to the dates appearing on Exhibit "B."

All of the above Exhibits were introduced in evidence and marked Exhibit "A," and all papers were submitted, subject to the rights of

each party to make any correction, if any errors are found therein by comparing the same with the originals; and also subject to the rights of either party to object to the relevancy or com-
8 petency of the exhibits introduced; and it is also agreed that these papers shall take the place of the originals.

Col. R. W. SIMPSON, being duly sworn, testified as follows:

Direct examination by Mr. CAREY:

Q. What is your relationship to Clemson Agricultural College?
A. I am one of the Trustees.
Q. What position do you occupy on the Board?
A. President.
Q. How long have you been President?
A. From the time the board was first organized.
Q. Were you the Executor of Mr. Thomas G. Clemson's will?
A. Yes, sir.
Q. Is that institution located in Oconee county?
A. Yes, sir, part of it; some of the buildings are in Pickens county.
Q. The main building is in this county?
A. All of the buildings, and the matter in question, are in this county.
Q. Was there ever any stock issued by the Clemson Agricultural College?
A. No, sir.

Objected to by Mr. Jaynes. As to whether or not it issued stock is not relevant; as to whether or not it is a corporation, that is to be determined by the Act of the Legislature; as to whether it issued stock, like a manufacturing plant, that is immaterial.

Mr. CAREY: No private corporation can exist without the issuance of stock, and the Courts have all held that a suit against a corporation is a different thing to a suit against a stockholder, and you can't reach a stockholder's part by a suit against the corporation. We make the issue that the property belongs to the State of South Carolina, and we have introduced deeds made to it and the Acts relating to it. I am willing to let either side bring out the testimony and let the Judge rule on it in his decree.

9 COURT: The only trouble about that is, it would make the Judge's decree very long and cumbersome. If the witness answers there were no stockholders—I am advised as a matter of law that there were no individual stockholders in that——

Mr. CAREY: If your Honor should be wrong, I want the entire thing to be before the Court, so when we get a decision in the Supreme Court we will have this thing disposed of, and that is why I made the proposition that each side make its proof, for there is nothing up now but the jurisdictional issue.

Mr. JAYNES: We say it is immaterial as to whether or not any stock was to be issued. It is apparent upon the will, upon the face of it, conveying the property of the State, and upon the face of the Act creating the College, and upon the face of the by-laws and ordi-

nances passed by the College, that there was no intention to issue stock, and it makes no difference. It is irrelevant and incompetent, and that is my objection to it, whether or not it was a stock company.

COURT: Subject to the objection of the Plaintiff, on the ground of irrelevancy and immateriality, I will allow the witness to answer the question.

Mr. JAYNES: I would like for your Honor to rule on it and let the record speak now.

COURT: Well, I will put it down, I rule on the question that it is irrelevant, because it appears that there were no stockholders from the record, but subject to the objection of the Plaintiff on the ground of irrelevancy and immateriality, the Court permitted the witness to answer the question.

Mr. JAYNES: Your ruling is that it is immaterial and irrelevant?

COURT: Yes, sir; subject to that objection, I will let it go up for the purpose of determining the issue.

Mr. CAREY: Your Honor ruled that your construction of
10 that act is, that there was to be no private stockholders, but if that construction is not correct you let this question come out in order that the entire issue might be settled.

COURT: Yes, sir; I let it come out subject to the Plaintiff's objection.

Mr. CAREY: Will you admit that there are no private stockholders?

Mr. JAYNES: No, sir; it is immaterial to the issue, and upon that point I ask for the Court's ruling, and ask that the testimony be not taken.

COURT: I am clearly with the view that there are no private stockholders, and I also want to further your view in getting the facts, as you call them, before the Supreme Court.

Mr. CAREY: Yes, sir, that is our view, and if that view is right, Mr. Jaynes can't be hurt by it, and if it is not right we will then have the facts in the case.

COURT: I don't see where it can prejudice you or me either, subject to the objection to my ruling.

Mr. Jaynes excepts.

Q. Are there any private stockholders in the Clemson Agricultural College?

A. No, sir.

Q. Has any stock been issued to individuals or to the State?

A. No, sir.

Q. Has any stock been issued to the Board of Trustees?

A. No, sir.

Q. Does the College pay any taxes?

A. No, sir.

Q. Does the Board make any return of the property?

A. No, sir.

Q. Does the Board of Trustees, for the College, either pay taxes for the College or make tax return?

A. You mean acting as a Board?

Q. A. Yes, sir.

A. No, sir.

Q. Acting as the Executor of the will of Mr. Thomas G. Clemson, to whom did you turn that property over?

11 Objected to by Mr. Jaynes. The deed is in evidence and speaks for itself.

Mr. CAREY: I am proving who is in possession of it.

COURT: Who, as Executor, did he actually and physically turn over the property to, as a fact?

Q. Who did you turn the property over to under the Clemson bequest?

Objected to by Mr. Jaynes.

COURT: Answer the question.

A. I understood, sir, that I turned it over to the State of South Carolina.

Q. Have you been on the Board of Trustees ever since the College was founded?

A. Yes, sir.

Q. You were one of the original Trustees named in the will?

A. Yes, sir.

Q. On which tract of land embraced in this deed has the dike been constructed?

A. It is on the eight hundred and fourteen acre tract—the one that Mr. Clemson devised to the State, and to which I made a deed to the State.

Q. That is down on the river?

A. Yes, sir.

Q. Which one of the tracts is the main building on?

A. The same tract.

Q. And the other buildings?

A. On the same tract, except a few dwelling houses and the hotel that are on the Lee land—a tract bought from the Lees.

Q. Which tract is the student's headquarters on?

A. On the same tract—the eight hundred acre tract.

Q. Which tract is the old Calhoun mansion on?

A. On the same tract. Everything about the College is on that tract except, as I stated, a few dwelling houses and the hotel, which is across the road in Pickens county, and on the Lee land.

Q. What other land, besides that you deeded to the State, does the College own?

A. It owns a tract—I have forgotten the number of acres,
12 two hundred and eighty, I think, that was purchased from Mrs. Isabella Lee. It is a part of the original tract of Fort Hill set off to her.

Q. Is that tract mentioned in the deed from Mrs. Floride Isabella Lee?

A. Yes, sir; that is the tract.

Q. I notice a deed here from Ella L. Lee.

A. That is the same tract, only confirmatory, I think possibly a dower.

Q. What land is the Lewis land?

A. That is a tract of fourteen acres, I think, purchased by the Board of Trustees from Mrs. Anna P. Lewis.

Q. How were those tracts of land—the Lewis land and the Lee land paid for?

A. I think they were paid for—if you will refer there—it was paid for by the State. The Lee land was bought by direction of the State, and the Lewis land was bought by the Trustees and paid for out of the State funds.

Q. The Lee land was bought under an Act of the Legislature authorizing it?

A. Yes, sir.

Q. And paid for by them?

A. Yes, sir; paid for by the State.

Q. What other funds come to the College besides what comes from the land?

A. Well, comes from the State, and we have the interest from the Clemson bequest, and we have the income from the Land Scrip fund that was donated by the Federal Government for the purpose of establishing Agricultural Colleges. That I have never seen. It is in the hands of the State Treasurer, and we only get the interest from it.

Q. Do any other funds reach you?

A. We have through the State a privilege tax.

Q. Who does that?

A. It is so much on every ton of fertilizer manufactured and sold in this State, and when a dealer wants quite a number of tags, he sends the money to the State Treasurer, and the State Treas-
13 urer issues an order upon the Board of Trustees, and they send to the purchaser the tags. We don't receive the money or have anything to do with it, except under the Act specifying how it is to be drawn out.

Q. Do you comply with that Act in drawing out that privilege tax fund?

A. Yes, sir.

Q. Do you get from the National Government anything except the Land Scrip fund?

A. We have two, one is the Hatch fund or experimental station fund, and we are not allowed to spend that money or any part of it, except as directed by the Department at Washington.

Q. That is the Hatch fund?

A. Yes, sir; and the Morrill fund is a fund appropriated by the Federal Government for the purpose of carrying on experimental stations, and the Act specifies how it shall be expended.

Q. Who superintends the funds coming from the Hatch fund and Morrell fund?

A. It is either the Treasury Department at Washington—I think they send a man here every year to see whether they are paid out

correctly or not. They have to be paid out according to the instructions of the Department at Washington.

Q. Does the College own any other property except that which you have testified to, growing out of the funds and the real estate?

A. I don't remember any, sir.

Q. Do you all make a report as to the acts and doings of the College?

A. Each year we are required to make a report of every dollar expended, and to itemize the report. We are required to make an itemized report and file it with the Comptroller General, and to make an annual report to the Legislature of all of the expenditures and how the money is expended, and this last session of the Legislature required us to make an itemized report to the Legislature.

Q. About what time was the dike in question erected?

A. According to my memory some time about 1894, sir.

Q. What time of the year was it when it was constructed?

14 A. It was put up in the summer after the crops were laid by.

Q. How was it put up?

A. It was put up by Mr. W. A. Neal, Superintendent of the Penitentiary.

Q. Was he Superintendent of the Penitentiary at that time?

A. Yes, sir.

Q. What labor did he use in building the dike?

A. The State convicts, sir.

Cross-examination by Mr. JAYNES:

Q. That dike was built in pursuance of the resolution of your Board of Trustees?

A. I think not; it was done by an act of the Legislature. It was in accordance with an Act of the Legislature.

Q. Didn't you all as the Board of Trustees pass resolutions authorizing the building of that dike?

A. Yes, sir; I think possibly we did; I don't remember.

Q. Your Board of Trustees consist of how many?

A. Thirteen.

Q. How many of the Board are appointed under the will of Thomas G. Clemson?

A. Seven.

Q. How many by the State?

A. Six.

Q. So the majority of that Board of Trustees, as represented and specified by the will and wish of Thomas G. Clemson—his will specifies how the majority of that Board shall be appointed?

A. I don't exactly understand your question. Repeat it, please.

Q. Well, I will put it in a different form. Is it not a fact that the seven members constitute a majority of that Board of Trustees, and they are appointed, or were appointed originally, and their successors are appointed from time to time, and they primarily represent the will and wish of Thomas G. Clemson in the management and

control of his affairs. That is, they are in the majority on that Board?

A. Yes, sir; the majority, but not a quorum. No money can be expended except by a vote of two-thirds, or nine of the members of the Board of Trustees.

15 Q. That is in accordance with the by-laws your Board adopted?

A. No, sir; it is in accordance with the statute.

Q. You have passed your own by-laws of your Board to that effect?

A. I don't know, sir.

Mr. CAREY: The by-laws are printed and they are here.

Q. Does that Act of the Legislature, in which you are given that authority and direction, relate only to the appropriation and payment of funds donated by the State of South Carolina?

A. We construe it, that it has reference to all of the funds passing through our hands; that we can't spend a dollar except voted upon by nine members of the Board.

Q. That Act relates to the funds appropriated from time to time by the Legislature?

A. I don't remember any by-laws——

Q. I asked you about the Act?

A. Well, I don't remember the wording of the Act.

Q. You don't say that it is not true, that that relates only to the money appropriated from time to time by the Legislature?

A. We construe it as applying to all the funds that come through our hands.

Q. This rule, which specifies that no funds can be appropriated or expended, except by a vote of two-thirds of the members of the Board of Trustees, that is confined to the State funds?

A. We don't apportion any of the money except by two-thirds—by a vote of two-thirds of the members of the Board of Trustees, as I said—by nine members of the Board.

Q. The funds that the Act of the Legislature requires the vote of nine members of the Board of Trustees relates only to the funds appropriated from time to time by the Legislature?

A. I have never construed the act. I only know what our rule is. We don't spend any money at all without a vote of nine members of the Board of Trustees, taken in ayes and nays.

16 Q. But if that rule operates with any of the funds that are expended by the Board in the maintenance of that College, other than the act of the Legislature requires such vote of nine members of the Board of Trustees, it is in pursuance of resolutions passed by the Board of Trustees, or by-laws?

A. I don't know as I can tell under whose——

Q. Answer my question.

A. I can't answer it.

Q. You can't say how the other funds, other than the funds appropriated by the Legislature, are paid out?

A. No, sir.

Q. You can't say whether it is done by an Act of the Legislature or by the by-laws of your Board?

A. No, sir, I can't tell from memory now.

Q. Well, suppose the concurrence of the nine members of the Board, with reference to funds other than that apportioned by the Legislature from time to time, is in pursuance to by-laws passed by the Board of Trustees, your Board can change that by-law?

A. Yes, sir; we are not bound by any. I don't know anything of such a by-law. We understand that nine members of the Board of Trustee have to vote in favor of all the money expended from all of the funds that are appropriated to the use of the College, or specifically appropriated, that is disposed of, and we endeavor to carry that out. We require a vote of nine members in expending all moneys or to make any appropriation.

Q. Suppose you would expend a great deal of money there upon the concurrence of nine members of your Board, and there was no Act of the Legislature requiring such a concurring vote, then it is in the discretion and power of the Board of Trustees to change a practice or resolution to that effect?

A. I couldn't say so, sir; I don't know of any such. It is only a hypothetical question, and I don't know of any such conditions.

Q. What funds have you there?

A. I have stated them.

17 Q. Don't you have another source of income?

A. No, sir.

Q. Don't you charge tuition?

A. Yes, sir; and some little things from the farm? I didn't think they mattered much, they are so small.

Q. What amount is raised from year to year as tuition?

A. I don't know, sir; very few pay tuition.

Q. Where is the report of the Treasurer?

A. It is not here.

It was agreed that the Plaintiff have the right to introduce the report of the Treasurer as to the receipts and disbursements of tuition.

Q. What is made on that bottom land there?

A. Corn and various things. Some times it is planted in one thing and then in another.

Q. What is done with the corn?

A. It is fed to the stock there on the place.

Q. The crops raised on all of the land mentioned here are expended there on the farm and for the maintenance of the College?

A. Yes, sir, fed to the stock and herds brought there for experiment.

Q. None of the proceeds from the sale of any of the crops raised on any of the property Mr. Carey mentioned finds its way into the State Treasury?

A. I have never heard of any.

Q. It is all expended on the ground there and the institution?

A. Yes, sir. None that I have ever heard of has ever done that. That is contrary to the rules of the College.

Q. That is the practice?

A. Yes, sir.

Q. That is the expectation?

A. Yes, sir.

Q. Who had been in the actual direction and control and management of the farm land, and who has authority to direct improvements on the property?

A. No one but the Board of Trustees. We have a man there that conducts the farming operations.

18 Q. He does it under your direction and control?

A. Yes, sir, the general direction. There is a Farm Committee.

Q. That, too—what they do finds its way back to the Board of Trustees?

A. Yes, sir, I suppose so.

Q. You have supervision and control over the whole matter?

A. Yes, sir.

Q. When the deed was made by you, as Executor of the will of Mr. Clemson, to the State of South Carolina, did the Governor, or the Comptroller General, or any State officer, assume the control over that property down there in the way of management, cultivating it or renting it?

A. I don't know hardly how to answer that. I never charged my mind with little things way back yonder, for I never expected to be called upon to answer them. My recollection is this: We understood, or we had fears of, or apprehension, or something of the kind, that Miss Lee was going to bring another action against the State—not against the State—against the will of Mr. Clemson, and try to set it aside in order to defeat the time in which the will gave the State the right to accept the bequest; and, therefore, I made a deed and delivered it in escrow, I think, with the Attorney General, and that deed was to take effect immediately upon the decision of the Supreme Court of the United States in my favor, if it was in my favor. That deed was made some time before the decision, and during that time I held the land as Executor, and I continued to hold it, I don't know how long. At the time I made the deed I turned over all of the property I had to the State—that is, real and personal—and I had to go back and ask the State for a little money to put up a monument. When it was made to the State of South Carolina the deeds were delivered and took effect when that decision was rendered, but I don't remember the date.

Q. The deed was made subject to the trusts and uses of the
19 will of Thomas G. Clemson?

A. I suppose so; I have not examined it. I suppose it was in accordance with the will. I wrote the will and I have a better recollection of the will, and I think the deed was made in conformity with the will.

Q. Don't you recollect that the will stated that a Board of seven perpetual Trustees should be in charge of that property?

A. There were to be thirteen Trustees.

Q. That body was to be perpetual and have control?

A. I don't remember that it uses the word perpetual.

Q. It does for the seven?

A. Yes, sir.

Q. And that seven was to be in majority?

A. The reason of that, at the time Mr. Clemson made his will, there had been quite a number of colleges, institutions established throughout the State by men who had regard for the welfare of the poor people of the State, and during radical times the funds had been stolen and the institutions broken up, and that was put in the will by Mr. Clemson that hereafter he wanted to keep it out of the reach of the negro; no majority or anything was thought of.

Q. It is a majority?

A. Yes, sir.

Q. And in order to keep it out of the hands of the negroes, if the State ever fell into the hands of the negroes they couldn't get hold of it?

A. Yes, sir; that was the object.

Q. After that acceptance by the State, what body went along in the physical and manual control of that property?

A. After the Legislature accepted the bequest and elected the other six Trustees, I think the Trustees then took charge of it.

Q. No State officer has ever interfered there in the cultivation or renting of that land?

A. What do you mean by State officer?

Q. Governor, State Treasurer or Comptroller General, repre-
20 senting the Governor, the policy of the State of South Carolina?

A. I don't know that any of these people ever have; we consider ourselves State officers, having control of that property.

Q. As the Board of Trustees?

A. Yes, sir; that is our understanding, that we represent the State in the management of that property.

Q. And no other officer outside of your Board of Trustees has ever interfered in the renting, cultivation or management of that property?

A. Of course they don't cultivate it or rent it, but there are other people who come up there who are over us, and examine into our affairs, and the Legislature sends committees there to examine into our affairs every year, and you might say they manage or give directions.

Q. What directions do they give you about the management of that farm, or what direction have you been given about the management of that farm by any State officer, other than as Trustee?

A. I don't know anything about the building of that dike. The Legislature authorized us to do that.

Q. I asked you if any State officer outside of a member of the Board of Trustees?

A. Well, Mr. W. A. Neal, Superintendent of the Penitentiary, had been working there.

Q. He came there in pursuance to a resolution of the Board of Trustees?

A. No, sir; I don't think.

Q. Didn't he come and employ the convicts in the construction of that dike in pursuance to a resolution of the Board of Trustees?

A. No, sir; I don't think. I don't remember. That is all a blank so far as my memory goes.

Q. What do you know or designate as the Executive Committee of the Board of Trustees?

A. Well, sir, to make my answer plain, the Board has established a number of what they call standing committees. The Executive Committee is a standing committee, and its duties are set forth in the by-laws there, and you will find it there.

21

Q. I find it on page six of the by-laws. Counsel reads by-laws as to the duty of the Executive Committee. That is the duty of the Executive Committee?

A. Yes, sir.

Q. It is very frequent that the Board of Trustees will confer additional duties upon any of the committees, the Executive Committee as well as any of them?

A. Yes, sir.

Q. I find from the extracts of the minutes, dated October 8, 1902, Mr. Norris explains that he called the meeting to take into consideration the matter of the dike, and the full Board would have met in March, too late to protect the crops of 1904. Was Mr. Norris then a member of the Board?

A. I presume from that he was.

Q. That meeting was called with reference to finishing the dike and ditch?

A. I don't remember anything about that.

Q. Was Mr. Norris, Bradley and Bowman on the Committee at that time?

A. I don't remember anything about that. There was so many committees going and coming, that I can't remember all of them.

Q. Do you pretend to say that that dike was built there without the direction and approval of the Board of Trustees?

A. No, sir; I take it for granted this way to make myself understood. The Board of Trustees has endeavored in all of the proceedings to carry out the instructions given them by the Legislature, and to perform the duties and obligations placed upon them by the Legislature. I remember a single fact that Mr. Neal came there with convicts and put the dike there. I have looked industriously for it, and that is all I know about it.

Q. Have you looked among the minutes of your own Board for that industriously?

A. No, sir.

22

Q. Wouldn't that be the place for you to look for it?

A. No, sir; not for such information as I wanted. I wanted to find it for the benefit of the Defendant, and I looked in the reports to the State, and the annual reports, and I looked everywhere to find that matter, and the only thing I found was the instruction of the Legislature to build that dike.

Q. That was passed long after you had been at work on the dike?

A. No, sir.

Q. Hadn't you been at work on that dike when that Act was passed?

A. No, sir.

Q. Don't the minutes of your Board show that you had taken action to work on the dike before that Act was passed?

A. No, sir.

Q. Suppose the minutes do show that your Board authorized that dike to be built before that Act was passed—what about that?

A. I won't answer a hypothetical question put in the shape of many conditional orders. It might put me in an awkward position.

Q. Answer the question, whether or not the dike was built or maintained with the approval of your Board of Trustees?

A. It couldn't have been built without the approval of the Board, and it could not have been maintained without the approval of the Board.

Q. Do you say it was built without the approval of the Board?

A. I don't remember, sir.

Q. Do you mean to say you don't know whether that dike was built without the approval of the Board of Trustees or not?

A. I don't remember, sir.

Q. So far as you know, it might have been built without their approval?

A. Yes, sir, it might have been built without their approval. I don't know.

Q. As far as you know, it might have been built with their approval?

A. I don't remember. I can't answer those kind of questions.

23 Q. How many acres of bottom land are there on the East side of Seneca River, on the Clemson College bottoms protected from the overflow by that dike on the river?

A. It has never been surveyed as I know of, and it is only an estimate. It is said that we have got one hundred acres in that, sir. There is some outside below there, and I don't know how much we have got where it is.

Q. That dike protects, or is intended to protect from the overflow, the lands behind it, lying on the East side of Seneca River?

A. It may have been intended to protect it, but it has never protected it; and then another thing, it was intended to protect it from a creek that runs in there.

Q. That dike runs on the East side, along the East bank of Seneca River?

A. Yes, sir, and up that creek.

Q. How far does that dike run along the East side of Seneca River?

A. I don't know, sir.

Q. Haven't you been there to see it?

A. Yes, sir; but I have never estimated the length of it. I sup-

pose some of the engineers have reported the length of it, but I don't remember it.

Q. About the length of it?

A. I couldn't do that, it has been so long since I have looked at it.

Q. How many times, during the ten years, have you known of a break in that dike?

A. I couldn't answer that only in this way: There has never been a freshet there of any consequence but what the dike has given way and the whole bottoms submerged. I remember this much: We thought in building it, or it was thought, that it was fully two feet above high water mark of the freshet of 1852, and the older men remembered that as the biggest freshet we have ever had in this country, but the first little freshet that came along, that was hardly a freshet at all, went over the top of the dike.

Q. Wasn't it because you cut off all of the channel that
24 holds the water and threw it on the West side of the channel in a little narrow strip of bottoms?

A. I am not very familiar with those bottoms: I don't know how wide the place is there, but it seems to me that the bottom land on the other side, where the dike begins, is very wide, and gets wider as it goes down.

Q. Don't you know that the bottom land you saved from overflow on the East side is three times as wide as the land on the West side, on which you forced that water?

A. The water from Clemson side goes off like a gourd and comes back into a neck.

Q. Take a point about the middle of that dike and strike a horizontal line, wouldn't you protect on th East side three times the distance that you would on the West side?

A. No, sir; not according to my judgment.

Q. According to your judgment, what would be the proportion?

A. I couldn't say.

Q. Why would you say it would not be three times as much?

A. Because of my observation.

Q. Give us your observation?

A. I don't know, I can't say. I say, to my mind, it is not anything like three times as wide as the bottom on the other side. It is, as I said, in a gourd shape, and the dike starts at Cemetery Hill and the river goes on straight, but our bottom land runs around to Lewis Creek, we call it, and runs into that piece of bottom and then goes around to Fort Hill and comes out right at the end of it at the river, and from Cemetery Hill down to Fort Hill is where the dike runs, except Lewis Creek is diked out and runs around.

Q. So as to throw the water from that creek into Seneca River and on to the West side?

A. That is down below your land.

Q. That is opposite the lower land?

A. I don't know.

Q. Have you any idea, to take a line and strike from East to

West, how much of that would be on the Clemson land and how much would be on the West side?

A. No, sir.

25 Q. You would say that there would not be three times as much, you don't think?

A. No, sir.

Q. Would you say there would be twice as much?

A. I don't remember.

Q. It would certainly be as much?

A. I can't answer the question. I have never looked at the land with that thing in view.

Q. You had breaks in that dike from time to time. Who authorized the breaks to be repaired?

A. The Board of Trustees.

Q. Did you bring Mr. Neal up there with his convicts?

A. No, sir; we did it with convicts.

Q. Who was in charge of the convicts?

A. A man appointed by the Superintendent.

Q. What was his name?

A. I don't remember the names of all of them.

Q. Was there one there by the name of Mr. McCracken?

A. Yes, sir; I think so.

Q. Who paid him?

A. I think he was paid by the penitentiary. I don't know; we have no control over him at all—it is doubtful.

Q. Isn't it that you hope it is doubtful? Don't you know that he was paid by that College?

A. I don't know, sir. I don't think he was. I don't know right at this moment.

Q. Hasn't Mr. J. P. Lewis done a great deal of work on that dike?

A. He is the man that represented the Board of Trustees generally in all matters pertaining to the farm.

Q. Don't you look to J. P. Lewis to make the repairs on the dike when they are needed?

A. Possibly so.

Q. Whatever resolution directing him to do so have been directed to Mr. Lewis when breaks occurred on that dike from the day it was first completed, with reference to having the repairs made, has been in pursuance of the order of the Board of Trustees?

A. I expect so.

26 Q. Who paid Mr. Lewis?

A. The Board of Trustees ordered it paid.

Q. He is paid out of the College funds?

A. Yes, sir.

Q. How long has he been employed there?

A. I can't answer the question. It has been a good long time. I can't say; he was not there when the dike was built.

Q. About how long?

A. I can't say.

Q. I find this resolution, "Mr. Lewis is authorized to put his con-

victs in and finish up the dike, under the direction of Prof. Brodie." Counsel reads resolution. Is that correct?

A. I expect that is correct.

Q. Isn't that a sample of the minutes of the Executive Committee of the Board of Trustees?

A. I don't know anything about the resolutions of the Executive Committee, and I can't say that that is a sample of the resolutions. That is, I expect, a correct resolution of the Board. The Legislature directed, in all of the Acts in which they gave us convicts, how they should be used, and they were used for that purpose, the certain purpose specified in the Act; and the Board of Trustees endeavored to carry out the different instructions under the Acts, and the convicts were scattered, or divided, among different parties who had control of them. Mr. Lewis had a certain number of convicts, and he was told to take his gang and do that work in preference to any other.

Q. And instructed to work on the dike in preference to any other farm work?

A. When was that?

Q. June 7th.

A. No, sir; I think you are mistaken about that.

Q. There it is; read it. June 7th, 1904. A. Well, I don't understand why that was done, unless there were some breaks there and they wanted to protect something else.

Q. Who employed Messrs. Ladshaw & Ladshaw to make plans and specifications for that dike?

A. I don't know, sir.

27 Q. What body?

A. I don't know, sir. Some of the Committees there very frequently went beyond their authority in doing things; and I don't think the Board ever authorized the employing of Mr. Ladshaw.

Q. Did your Board ever dishonor that?

A. No, sir; when a thing was done for the good of the College, it was not.

Q. Out of what funds were the Ladshaws paid?

A. I don't know sir; there was an appropriation made for everything.

Q. And that appropriation was made by the Board of Trustees?

A. Yes, sir; the Board of Trustees might have made an appropriation for them. I don't know, for I never saw the Ladshaws there, either one of them.

Q. Did you talk with either one of them?

A. No, sir.

Q. When were you at the dike?

A. It has been a good many years ago.

Q. Were you there when the work was commenced?

A. When Mr. Neal commenced work, yes, sir; I was about there, I expect. At that time I was about there frequently, I suppose. I suppose I was, I remember seeing the hands at work.

Q. What purpose did you have in going out there?

A. I can't tell, I had to go very frequently, and I would stand out on the hill and see them at work.

Q. What carried you down there?

A. I don't know, sir. I stood on the hill and saw it; and at that time I had to sign every check issued by the Board; and during that time I was frequently at the College, and I couldn't tell what all I was there for.

Q. How were the expenses of the convicts defrayed?

A. The ones that Mr. Neal brought there?

Q. Yes, sir.

A. I don't think we paid anything for them. We might have fed them.

Q. Who defrayed the expenses of keeping the convicts and the guards?

A. I expect the College did. I don't remember.

28 Q. Have you other convicts there?

A. The convicts we have there, the College boards them.

Q. How many do you keep there from year to year?

A. That has been changed by the Legislature. We have thirty now.

Q. How are the convicts employed?

A. They are employed by the Legislature in keeping the grounds and improvements.

Q. Do they work on the farm any?

A. Yes, sir; some of them.

Q. How are the crops raised on this land—who works the crops?

A. I don't know, sir. I don't go into every detail.

Q. What committee has the control of cultivating this bottom land?

A. I don't know, sir. I think Mr. Bradley and Mr. Sease and one other, I don't remember his name.

Q. What is the name of the Committee?

A. I think it is called the Farm Committee.

Q. And that committee is appointed by the Board of Trustees?

A. Yes, sir.

Q. And make their report back to your Board?

A. Yes, sir, if they make any report at all.

Q. If anything goes wrong with that committee they have to report it to your Board?

A. Well, if anything should go wrong.

Q. The Board of Trustees have the power to correct any misconduct of any member of that committee or any employee?

A. I don't know about that; we have never had any misconduct there.

Q. I asked if your Board didn't have the power to see that none is committed, or to correct any error that is made?

A. Suppose that committee would go and do a thing, it is done. These are matters of detail, and turned over to the committee.

Q. Suppose that committee does a wrong; you can revoke

29 that committee and appoint another committee? —

A. Yes, sir, I suppose so, but nothing ever goes wrong.

Q. Well, you have the power to control that committee?

A. Well, I don't know that we control a man's discretion, but if

he goes wrong, and where the Board thought it was not to the best interest of the College, I have no other doubt but what the Board would remove the committee.

Q. That Farm Committee has either the approval, or the implied approval, of the Board of Trustees?

A. Well, I might say yes.

Re-direct examination by Mr. CAREY:

Q. Is the College running now?

A. Yes, sir.

Q. How many students are down there?

A. Somewhere between six hundred and six hundred and fifty.

Q. The tuition paid in by poor students, what becomes of that?

A. They don't pay any.

Q. Do any of the students pay?

A. A very few.

Q. Those who do pay tuition, how is that applied?

A. To run the expenses of the College.

Q. This property you deeded to the State, and the other property since the date of your deed—there has been no deed transferring it to anybody else?

A. No, sir.

Q. It is still in the hands and control of the State as originally—the State owns the College and still owns the property?

A. Yes, sir. I would like to say this: There has been quite a number of persons asked to build, or asked for the privilege to build, houses on that property, and the Board has refused promptly, stating that it was the property of the State, and that the Board had no authority.

Q. When you made your settlement as Executor of the will of Thomas G. Clemson, who did you make it with, and who did you turn the property over to?

A. I turned the property over to the State.

30 Q. What State officer?

A. I think it was the State Treasurer. I am almost certain it was, but I would not like to swear that, for I don't remember those little things way back yonder.

Q. On all of this land on which the dike was built, and all of the land it was to protect, was on the original tract of land conveyed to the State by you as Executor of the will of Thomas G. Clemson?

A. Yes, sir.

Q. There has never been but one dike built there?

A. No, sir, and it has been repaired, and the manner in diking out Lewis Creek, that has been changed.

Q. I am speaking of on the river?

A. No, sir.

Q. All of the diking that has been done since, is the repairing and the protection of that dike?

A. Yes, sir.

Q. How are the convicts supplied to you, all that you get?

A. By an Act of the Legislature.

Re-cross examination by Mr. JAYNES:

Q. Didn't a company, or a private individual, lease a house? Who is in charge of the hotel?

A. A set of young men in the College, who formed a club to board there, and to board themselves, and the Board required them to take in other people. But it is a club of young men there.

Q. You have never leased the property to anybody?

A. Not that I remember of.

Q. And you have never sold off any?

A. No, sir.

Defendant rests.

Dr. JOHN HOPKINS, being duly sworn, testified as follows:

Direct examination by Mr. JAYNES:

Q. Where do you live?

A. Seneca City.

Q. What is your age?

A. I am seventy-two years old.

Q. Do you know the lands described in the second paragraph of the complaint?

A. Yes, sir.

Q. Who owns those lands?

A. I own them, sir.

31 Q. How long have you owned them?

A. I don't recollect. If you will refer to the deed there you will see. I can't recollect it, but it has been quite a number of years.

Q. Have you been in possession of those lands ever since this deed was made to you?

—. Yes, sir; by Mrs. Malone, of Charleston.

Deed from Margaret F. Malone to Dr. John Hopkins introduced in evidence, dated January 9, 1880, and also two plats executed by M. S. Mackey, surveyor, dated September 28, 1871, and September 4, 1871.

Q. How many acres are in the entire tract?

A. There are two tracts, two hundred and eighty-three acres.

Q. What tract lies on the river and contains the bottom land?

A. That is a hundred and thirty-three acres.

Q. How much bottom land is there in that tract?

A. Well, it has always been known as about forty-three acres.

Q. Where does it lie?

A. On the East side from the Clemson College dike, right opposite that. On the West side, I mean.

Q. On which side of Seneca River does your bottom land lie on?

A. On the West side.

Q. Where does it lie with reference to the dike constructed by Clemson College?

A. Right opposite the dike on the West side.

Q. And that is the entire forty-two acres?

A. Yes, sir, with two acres a little higher up that joins that.

Q. What was the character of that bottom land at the time you purchased it?

A. Well, it was mighty fine land. If it had not been for the bottom land I would not have bought it. The only thing that made me buy it was the bottom land, and it was comparatively level.

Q. What was the state of its fertility?

A. It was very fine. I always raised very fine crops of corn on it.

Q. What was its condition in 1894 and 1895?

Objected to by Mr. Carey.

32 Mr. JAYNES: We have got to show some injury to show that we have a standing in Court. Unless we show injury-damage we are not in Court.

Q. What was the character of that land in 1894 and 1895, when the dike was constructed?

A. The land was all right until after the construction of that dike.

Q. What has come to pass since that?

A. It is very much washed—my bottom land is very much washed, and, in fact, it is very near ruined. A great deal of it is washed in great holes, and it has washed the bank down the river, and where it is washed down there it is one-third wider. It is a hundred and twenty-five yards there. My bank is all washed down, and the timber, with the leaves for protection, is all washed into the river and gone. The timber on the bank of the river is all washed up and gone, and there are great holes and gullies washed through my land.

Q. What caused that injury?

A. Well, if you want me to go into the whole thing——

Objected to by Mr. CAREY: That is trying the whole issue here.

COURT: I thought it had been agreed upon that I was not to pass upon any issue here except the issue specified.

Mr. JAYNES: In order to show that we have got a standing in Court——

Mr. CAREY: We admit that you have got a standing Court. We have not demurred to the complaint. We are perfectly willing for you to ask the witness if he thinks the dike has damaged him, but to go into the whole case, we object to that.

Mr. JAYNES: Take this down, Mr. Stenographer: For the purpose of this motion, it is admitted by the Defendant, that the construction of the dike——

Mr. CAREY: No, I won't admit anything. We won't admit that we have damaged Dr. Hopkins.

33 Q. State whether or not, in your opinion, the damage and injury to your land has been caused by the construction and maintenance of that dike?

A. Yes, sir, nothing but the dike caused it.

Q. What is your estimate of the damage to your property by reason of the construction of that dike?

A. Well, sir, I couldn't have the bank put back there for ten thousand dollars, and I couldn't have the bottom land put back there for ten thousand dollars.

Q. What would you say, in your opinion, is a reasonable amount of what damage has been done to you by reason of this dike being constructed and maintained there?

A. I would say eight thousand dollars.

By-laws and ordinances of the Board of Trustees of Clemson College, and Act of the Legislature creating Clemson College, and municipality, authorizing it for the purpose of peace and good order for a radius of five miles; reports of the Treasurer of Clemson College, and reports of the various committees constituted by the Board of Trustees; report of the Board of Trustees, showing the receipts and disbursements of funds of Clemson College from 1894 to 1895, inclusive, and especially all such reports as made by the various committees and the Board of Trustees, or the Treasurer to the General Assembly, within the years above mentioned, introduced in evidence.

Plaintiff rests.

Col. R. W. Simpson, recalled, by Mr. Carey, in reply:

Q. In your opinion, have the lands of the Plaintiff in this case been damaged by that dike?

A. Not a bit in the world.

Q. What is the condition of the river land above and below the dike?

A. I have not been over that much, but they are very much washed out and covered with sand, what I saw.

Q. Is there a washout above the dyke that goes across the
34 Plaintiff's land in this case?

A. I don't know whether it is above the dyke or not, but I think there is one washout on the Plaintiff's land; I don't know. I was told that it was the Plaintiff's land, and I presume it is. If next to the river is the Plaintiff's land, there is a washout going across that land.

Q. If there is any damage to his land, what do you think was the cause of it?

A. I think one thing, a very sudden bend in the river washed out there, and that washout has been there a very long time, judging from the stumps in that washed out place.

Q. What is your judgment as to the length of time that wash has been there?

A. Thirty-five or forty years.

Q. That is at the upper end of the dike?

A. Yes, sir.

Q. What does that dike consist of?

A. Sand throwed up, and sometimes clay.

Cross-examination by Mr. JAYNES:

Q. When were you last on this bottom land on the river opposite the dike? On the Plaintiff's land?

A. I have never been there but once, and that was after the complaint was served upon me.

Q. That was some time this winter?

A. I think so, sir; it was just about the time our answer was dated.

Q. Can you say whether or not, of your own knowledge, that washout was there when that dike was built?

A. That washout that I saw has been there thirty or forty years.

Q. Of your own knowledge, could you say whether it was there or not?

A. How could I tell, except by examining the evidences there? I couldn't tell about a physical fact, only by the evidences I saw there, and I saw big stumps in the bottom of the washout and big trees.

Q. You don't know when it was made?

35 A. No, sir; it might have been made a hundred years ago. I don't know.

Q. And it might have been made five or ten years ago?

A. No, sir? that is impossible.

Q. Why?

A. There were large stumps and trees in the bottom of it.

Q. Could you say that there has not been any washes made there within the last ten years?

A. I didn't see any there, sir, but one.

Q. Can you speak as to whether or not the bottom lands were rich and fertile ten years ago?

A. No, sir; I can speak comparing them with other bottom lands around there ten years ago, and the lands in all of that community are as good as they were ten years ago.

Q. Did you pay any attention to Dr. Hopkins' land prior to last winter?

A. No, sir.

Q. Then you can't say what its fertility was ten years ago?

A. No, sir; only comparing it with the other lands in that community.

Q. You would only guess at it?

A. It would be an opinion founded upon my knowledge of bottom land all my life in that community.

Q. But speaking of any specific knowledge of it?

A. No, sir, I didn't have any specific knowledge of his land until I went over there after the complaint was served upon me.

Q. Were you down in his bottom lands to pay any attention to them before this complaint was served upon you?

A. I don't remember that I ever was.

It was admitted by the Plaintiff that the deeds that were introduced in evidence, that the granters were seized in fee of the lands therein at the date of said deeds.

Defendant rests.

36 EXHIBITS—WILL OF THOS. G. CLEMSON.

STATE OF SOUTH CAROLINA, *County of Oconee:*

Whereas, I Thos. G. Clemson, of the county and State aforesaid, did, on the 14th day of August, 1883, execute my last will and testament, wherein I sought to provide for the establishment of a scientific institution upon the Fort Hill place, and therein provided what sciences should be taught in said institution; and whereas, I am now satisfied that my intention and purpose therein may be misunderstood as intending that no other studies or sciences should be taught in said institution than those mentioned in said will, which was not my purpose or intention:

Now, desiring to make my purpose plain, as well as to make some other changes in the disposition of my property than made in said will, I do now make, publish and declare this instrument as and for my last will and testament, hereby revoking all previous wills and codicils by me made, especially the will above referred to, dated August 14, 1883.

Feeling a great sympathy for the farmers of this State, and the difficulties with which they have had to contend in their efforts to establish the business of agriculture upon a prosperous basis, and believing that there can be no permanent improvement in agriculture without a knowledge of those sciences which pertain particularly thereto, I have determined to devote the bulk of my property to the establishment of an agricultural college upon the Fort Hill place.

This institution, I desire, to be under the control and management of a board of trustees, a part of whom are hereinafter appointed, and to be modeled after the Agricultural College of Mississippi as far as practicable.

My purpose is to establish an agricultural college which will afford useful information to the farmers and mechanics; therefore, it
37 should afford thorough instruction in agriculture and the natural sciences connected therewith. It should combine, if practicable, physical with intellectual education, and should be a high seminary of learning in which the graduate of the common schools can commence, pursue and finish a course of studies, terminating in thorough theoretic and practical instruction in those sciences and arts which bear directly upon agriculture, but I desire to state plainly that I wish the trustees of said institution to have full authority and power to regulate all matters pertaining to said institution—to fix the course of studies, to make rules for the government of the same, and to change them as, in their judgment, experience may prove necessary, but to always bear in mind that the benefits herein sought to be bestowed are intended to benefit agricultural and mechanical industries. I trust that I do not exaggerate the importance of such an institution for developing the material resources of the State by affording to its youth the advantages of scientific culture, and that I do not overrate the intelligence of the Legislature of South Carolina, ever distinguished for liberality, in assuming that such ap-

propriations will be made as will be necessary to supplement the fund resulting from the bequest herein made.

Item 1. I therefore give and devise to my executors, hereinafter named, the aforesaid Fort Hill place, where I now reside, formerly the home of my father-in-law, John C. Calhoun, consisting of eight-hundred and fourteen acres, more or less, in trust, that whenever the State of South Carolina may accept said property as a donation from me, for the purpose of thereupon founding an agricultural college, in accordance with the views I have hereinbefore expressed (of which the Chief Justice of South Carolina shall be the judge), then my executor shall execute a deed of the said property to the said
38 State, and turn over to the same all property hereinafter given as an endowment of said institution, to be held as such by the said State so long as it, in good faith, devotes said property to the purposes of the donation: provided, however, that this acceptance by the State shall be signified, and a practical carrying-out be commenced within three years from the date of the probate of this my will. During this term of three years, or as much thereof as may elapse before the acceptance or refusal of this donation, my executor shall invest the net produce of the land and other property; such invested fund awaiting the action of the Legislature, and to form a part of the endowment of said institution if accepted, or to form a part of the endowment of the college or school hereinafter provided for, should the donation not be accepted by the State.

Item 2. The following named gentlemen, seven in number, shall be seven of the board of trustees, to-wit: R. W. Simpson, D. K. Norris, M. L. Donaldson, R. E. Bowen, B. R. Tillman, J. E. Wannamaker and J. E. Bradley, and the State, if it accepts the donation, shall never increase the board of trustees to a number greater than thirteen in all, nor shall the duties of said board be taken away or conferred upon any other man or body of men. The seven trustees appointed by the above shall always have the right, and the power is hereby given them and their successors, which right the Legislature shall never take away or abridge, to fill all vacancies which may occur in their number by death, resignation, refusal to act, or otherwise. But the Legislature may provide, as it sees proper, for the appointment or election of the other six trustees, if it accepts the donation. And I do hereby request the seven trustees above named, or such of them as may be living, or may be willing to act, to meet as soon after my death as practicable, and organize, and at once to fill all vacancies that may have occurred, and to exert themselves to
39 effectuate my purposes as herein set forth, and I hereby instruct my executor to notify them of their appointment herein as soon after my death as practicable. The name of this institution shall be the "Clemson Agricultural College of South Carolina."

Item 3. Should the three years expire without the State accepting the donation, in manner as hereinbefore provided, and, if accepted, at the expiration of three years from my death no practical beginning has been made to carry into effect the purposes of the donation, or, if before the three years expire the Legislature shall refuse to accept said donation, then the donation to the State is hereby revoked,

and my executor shall execute his trust by conveying the said Fort Hill place, and the accumulated fund arising therefrom, together with all other property, real or personal, hereinafter disposed of and intended to be given to the said agricultural college, as an endowment, to the seven trustees named above, or their successors, who shall erect upon the Fort Hill place such a school or college for the youth of South Carolina as, in their judgment, will be for their best interest; provided, that said school or college shall be for the benefit of the agricultural and mechanical classes principally, and shall be free of cost to the pupils, as far as the means derived from the endowment hereinafter provided and the use of the land may permit. The trustees shall securely invest the funds hereinafter provided and given to said institution and hold them as a perpetual endowment, and shall only use the interest derived therefrom and the income of the land to support and maintain said school or college, except that the accumulated fund derived from the land, and the interest derived from the fund hereinafter given said institution, from the time of my death, and as much as five thousand dollars of the principal fund, may be used if, in the judgment of the trustees, it may be necessary, to erect suitable buildings for said school or college. The name of this institution shall be the "Clemson Scientific School" or "College."

Item 4. It is my desire that the dwelling house on Fort Hill shall never be torn down or altered, but shall be kept in repair, with all the articles of furniture and vesture which I hereinafter give for that purpose, and shall always be open for the inspection of visitors, but a part of the house may be used by such of the professors as the trustees may direct.

Item 5. I give and bequeath to my granddaughter, Floride Isabella Lee, all of my silver plate and table silver, also all of the family pictures, except the large picture of John C. Calhoun, now hanging in my sitting room, also any one article in my present residence which she may select as a memento of me, also my decorations, and also the sum of fifteen thousand dollars ($15,000), to be paid to her on the day of her marriage, or when she becomes twenty-one years of age, if unmarried; provided, that if my said granddaughter should die unmarried, and before she is twenty-one years of age, then all of said property mentioned in this item shall revert to and become a part of the residue of my estate, and become subject to the trusts and conditions of Items 1, 2 and 3 of this my will.

Item 6. I give and bequeath to my faithful housekeeper, Mrs. Jane Prince, one year's provisions for her and daughter, and furniture and bedding, suitable to her condition, sufficient to furnish two rooms and the sum of three thousand dollars ($3,000), to be paid to her at the expiration of one year after the probate of this my will, and I also desire my executor to permit her to live at Fort Hill until he disposes of the property as herein directed.

Item 7. I give and bequeath to Hester Prince, the daughter of my faithful housekeeper, as aforesaid, the sum of three thousand dollars ($3,000), to be paid to her, or such person as may be selected by her and appointed her guardian, at the expiration of one year from the probate of this my will.

Item 8. I give to my executor, James H. Rion, as a memento of my friendship, the antique entaglio Marcus Aurelius Antonius sealing which I habitually wear, and also such one of my pictures as he may select, if the same is not selected by myself.

Item 9. I give and bequeath to my executor, to be held by him subject to the trusts and conditions of Items 1, 2 and 3 of this my will, and for the purpose of adorning the Fort Hill residence as provided in Item 4 of this my will, all of my permanent furniture, relics and articles of vesture, pictures and paintings, including the large painting or picture of John C. Calhoun, now hanging in my sitting room, and not otherwise disposed of herein, and all my books.

Item 10. I direct my executor to sell, at public or private sale, as he may deem best, all the balance of my personal property upon my Fort Hill place, not herein disposed of, and to sell and convey all of my real estate lying and situate outside of the State of South Carolina, either at private or public sale, as he may deem best, and to hold the proceeds derived therefrom, together with the proceeds of the personal property, herein directed to be sold, subject to the trusts and conditions of Items 1, 2 and 3 of this my will.

Item 11. All the residue and remainder of my property, of every kind and description whatsoever, after paying off the legacies above provided for, together with the property which may revert to my estate, should it revert thereto, and the proceeds of all my real and personal property herein directed to be sold, and all accumulated funds derived from the Fort Hill place, and interest on my
42 investments, I give and bequeath to my executor, to be held by him subject to the trusts and conditions of Items 1, 2, and 3 of this my will.

Item 12. I nominate, constitute and appoint my friend, James H. Rion, the executor of this my will.

In witness whereof I have hereunto subscribed my name and affixed my seal before the witnesses below subscribing, this the 6th day of November, A. D. 1886.

THOS. G. CLEMSON. [L. S.]

The above written instrument was subscribed by the said Thos. G. Clemson in our presence and acknowledged by him, to each one of us, and he, at the same time, published and declared the same to be his last will and testament, and we, at his request, and in his presence, and in the presence of each other, have signed our names as witnesses hereto.

JAMES HUNTER,
T. O. JENKINS,
E. L. C. TERRIE.

STATE OF SOUTH CAROLINA,
County of Oconee:

I, Thos. G. Clemson, of Fort Hill, in the State and county aforesaid do make this my codicil to my last will and testament, dated the 6th day of November, 1886, hereby confirming my said last

will and testament so far as the same is not inconsistent with this my codicil.

Item 1. I will and direct my executor to pay my debts and funeral expenses as soon after my death as practicable, out of the proceeds of any part of my estate that is the most available.

Item 2. I hereby revoke the 12th item of my last will and testament as aforesaid, in which I appointed James H. Rion my executor of my will, he having recently departed this life, and I now nominate and appoint my trusted friend, Richard W. Simpson, of Pendleton, South Carolina, my executor of my said last will and testament, and of this my codicil thereto, and in my said
43 last will and testament the name of James H. Rion, wherever it appears, shall be stricken out, and Richard W. Simpson shall be inserted in place thereof.

Item 3. I revoke the 8th item of my last will and testament, in which I gave to James H. Rion my sealing ring and one of my pictures, which he may select, and I do now give and bequeath to R. W. Simpson my sealing ring, which I habitually wear, and such one of my pictures as he may select.

Item 4. I do hereby revoke Item 6 of my said last will and testament, which contains a bequest to my faithful housekeeper, Mrs. Jane Prince, she having been otherwise provided for.

Item 5. It is my will and I do direct that neither the legacy to my granddaughter in the fifth item of my said last will and testament, or the legacy to Hester Prince in the seventh item of my said will, shall bear any interest until the same are due and payable, as provided in the said items of my said will.

Item 6. I authorize my executor to purchase that portion of the original Fort Hill tract of land set off to Gideon Lee, guardian of Floride Isabella Lee, and the same, if so purchased, shall become a part of the Fort Hill tract of land, and shall go with and be disposed of as I have in my said will disposed of the Fort Hill tract.

Item 7. I will and direct my executor to sell, either at private or public sale, and for cash or upon a credit, both as he may think best, all the real estate of which I may die seized and possessed, except the Fort Hill tract of land, whether the same be situated in the State of South Carolina or outside of it.

Item 8. Should the Chief Justice of South Carolina decline to decide when the State of South Carolina has or has not accepted the donation given to it in the first item of my said will, then I give to my executor the same power as I, in the said first item of my will, gave to the said Chief Justice, and his decision shall be final.

44 Item 9. I hereby authorize and direct my executor to employ such persons as he may deem necessary to take charge of the Fort Hill dwelling house and the articles therein donated, and to manage the farm, and to pay the said persons such a sum of money for their services as he may deem right and proper.

Item 10. In view of the great responsibility and labor which my executor will encounter in managing the affairs of my estate, as directe*cted* in my said will, and in consideration of the great kindness he has shown to me, and of the assistance in taking care of my

business when I had no other person or friend to help me, I will and bequeath that he, my said executor, shall have, take and receive, in addition to the usual commissions allowed by law to executors as commissions for receiving and paying out money, five per cent. of the appraised value of my entire estate, both real and personal.

Item 11. I desire to state here that my granddaughter, Floride Isabella Lee, has received the one-fourth part in value of the original Fort Hill tract of land, the part which her mother, under the will of Mrs. John C. Calhoun, was entitled to, the same having been appraised and set off to her by commissioners appoined by Mrs. Clemson, and by Gideon Lee, her father and guardian, and she has also received through Gideon Lee, her said guardian, her mother's share of the estate of my son, John C. Clemson. Notwithstanding this fact, from a letter received by me some time ago from Gideon Lee, I am led to believe that, as guardian of my said granddaughter, he will make claim of my estate a large balance alleged by him to be due my said granddaughter by me. I therefore desire and direct my executor to examine closely into such claim, if so made, and if he, my said executor, is satisfied that the claim so made is justly due by me to my said granddaughter, to pay the same; but, on the other hand, if he is not satisfied that the said claim or claims are justly due by me, then he shall not pay it or them unless compelled by law to do so, in which case I hereby revoke so much of the bequest of fifteen thousand dollars, given in the fifth item of my said last will and testament to my said granddaughter, as will be equal to the amount which my said granddaughter may recover against my estate.

Item 12. The desire to establish such a school or college as I have provided for in my said last will and testament, has existed with me for many years past, and many years ago I determined to devote the bulk of my property to the establishment of an agricultural school or college. To accomplish this purpose is now the one great desire of my life. I have not been unmindful of the interest of my said granddaughter, nor have I acted in this matter through any prejudice to any one. It may be possible that the disposition of my property as herein made may not give satisfaction to my said granddaughter or to Gideon Lee, her father and guardian, but I trust that neither the one or the other, or any other person lawfully authorized by law to represent my said granddaughter, will ever attempt to frustrate or defeat the purposes which I have herein sought to accomplish, but will respect the settled desire of my life as contained in this my will; but should my desire and request as herein expressed be ignored, and should Gideon Lee, as guardian of my said granddaughter, or should my said granddaughter herself, or any other person lawfully authorized by law to represent her or any person as heir, legatee or distributee of my said granddaughter in their right as such, attempt to contest my will or attempt to invalidate it, or attempt to change or alter it in any particular whatever, then it is my will, and I do direct, that such attempt or attempts to contest, alter, change or invalidate my said last will and testament,

or codicil hereof, shall, as soon as commenced, work an abso-
46 lute revocation of my entire and of all of my bequests to my said granddaughter, Floride Isabella Lee, as made in the fifth item of my said last will and testament, and then, and in that case, my said granddaughter, Floride Isabella Lee, shall receive no part of my estate whatever, and the money and articles mentioned in the fifth item of my said will shall go to my executor and be held by him subject to the trusts and conditions contained in Items 1, 2 and 3 of my said last will and testament; provided, that my executor may sell, in manner as to him may seem proper, any of the articles mentioned in the said fifth item of my said last will and testament, except the family pictures. These shall be held by my executor subject to the trusts and conditions of Items 1, 2 and 3 of my said last will, and kept with the other articles mentioned in the eighth item of my said last will and testament, to adorn the Fort Hill house.

Item 13. It is my will and I direct that my executor shall not be held liable for, or responsible for any losses to my estate by reason of my errors of judgment or mistakes, as I am fully aware of the varied and responsible duties I herein have required of him. This codicil is written in part on the fourth page of my said last will and testament to which this sheet is attached, and which is dated November the 6th, 1886.

Item 14. I authorize and empower my executor to expend such sums of money as he may deem necessary to keep the Fort Hill dwelling house and premises in good repair, and the Fort Hill farm in good condition.

In witness whereof I have hereunto subscribed my name and affixed my seal, before the witnesses below subscribing, this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-seven (1887).

THOS. G. CLEMSON. [L. S.]

The above written instrument was subscribed by the said
47 Thos. G. Clemson in our presence and acknowledged by him to each one of us, and he at the same time published and declared the same to be his codicil to his last will and testament, and we, at his request and in his presence, and in the presence of each other, have signed our names as witnesses hereto.

R. M. JENKINS.
C. W. YOUNG.
J. H. MOUNCE.

Act Accepting Clemson Bequest.

(XX Statute, 277.) An Act to Accept the Devise and Bequest of Thomas G. Clemson, and to Establish an Agricultural College in Connection Therewith.

Whereas, the Honorable Thomas G. Clemson departed this life on the sixth day of April, A. D. 1888, leaving of force his last will

and testament, which was duly admitted to probate on the twentieth day of April, 1888, in the office of the Judge of Probate for the County of Oconee, in the State of South Carolina, wherein he devised and bequeathed to his executor, Richard W. Simpson, of Pendleton, South Carolina, a tract of land situated on Seneca River, in Oconee County, in said State, containing eight hundred and fourteen acres, more or less, known as the Fort Hill plantation, as well as all of his other property, both real and personal, except certain legacies in the said will mentioned and provided for, all in trust to convey to the State of South Carolina when the said State shall accept the same for the purpose of establishing and maintaining an Agricultural and Mechanical College upon the aforesaid Fort Hill plantation upon the terms and conditions of said will; therefore,

SEC. 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, that the State of
48 South Carolina hereby expressly declares that it accepts the devise and bequest of Thomas G. Clemson subject to the terms and conditions set forth in his last will and testament, and that the Treasurer of the State be, and he is hereby, authorized and empowered to receive and securely hold the said property, both real and personal, and to execute all necessary papers and receipts therefor as soon as the said executor shall convey and transfer the said devise and bequest to the said State.

SEC. 2. That upon the execution of a deed and transfer of said property to the State by the said executor in accordance with the provisions of said will, an Agricultural and Mechanical College shall be, and the same is hereby, established in connection with the aforesaid device and bequest, to be styled "The Clemson Agricultural College of South Carolina," and to be situated at Fort Hill, in Oconee County, on the plantation so devised, in which college shall be taught all branches of study pertaining to practical and scientific agriculture and other industries connected therewith, and such other studies as are not inconsistent with the terms of the said will.

SEC. 3. That said college shall be under the management and control of a board of thirteen trustees, composed of the seven members nominated by said will, and their successors, and six members to be elected by the Legislature in Joint Assembly every fourth year after the first election; said board to elect one of their number to be president, and to elect a secretary and fix his salary. They shall organize the college and put it in operation as soon as practicable after the passage of this Act; shall prescribe the courses of study, shall declare the professorships, elect the professors, of whom the number shall not exceed ten, and define their duties and fix their salaries, and make all rules and regulations for the govern-
49 ment of the college. They may employ such superintendent, head workmen, laborers for the farm, shops and grounds as may be necessary, and fix their compensation. They shall charge each student a tuition fee of forty dollars per annum: Provided, that said fee shall not be charged until the funds arising out of the said bequest shall be exhausted in accordance with the terms of the said

will: Provided, further, that indigent students shall not be required to pay said tuition.

SEC. 4. That the said Board of Trustees is hereby declared to be a body politic and corporate, under the name and style of the Clemson Agricultural College of South Carolina. They shall have a corporate seal, which they may change at their discretion; and in their corporate name they may contract for, purchase and hold property, for the purposes of this Act, and may take any property or money given or conveyed by deed, devise or bequest to said college, and hold the same for its use and benefit; Provided, that the conditions of such gift or conveyance shall in no case be inconsistent with the purposes of this Act, and shall incur no obligation on the part of the State. They shall securely invest all funds and keep all property which may come into their possession, and may sell any of the personal property not subject to trust, and reinvest the same in such way as they may deem best for the interest of said college. They may sue and be sued, plead and be impleaded, in their corporate name, and may do all things necessary to carry out the provisions of this Act, and may make by-laws for this purpose if they deem it necessary.

SEC. 5. That it shall require a two-thirds vote of the said Board of Trustees to authorize the expenditure of any moneys appropriated to the said college by the State, or to authorize the sale or transfer or reinvestment of any property or moneys arising from the sale of any property under the provisions of this Act.

SEC. 6. That for the purpose of erecting buildings on said Fort Hill plantation, and of purchasing stock and implements therefor, and paying expenses, as herein provided, the sum of three thousand dollars be, and the same is hereby, appropriated, if so much be necessary, to be paid by the State Treasurer upon the order of the board of trustees of said college, signed by their president and secretary: Provided, that not more than fifteen hundred dollars thereof shall be used in erecting buildings, fixtures or permanent improvements on said Fort Hill plantation pending litigation in respect to said property: And provided, further, that all personal property purchased with money appropriated by the State shall be taken and held by the board of trustees as property of the State of South Carolina; and it shall be the duty of said board of trustees to make to the Legislature an annual report of the college, and of all farming operations and tests and experiments, and of all receipts and expenditures, with a statement of the condition of the property and funds of said college, and of all receipts and expenditures of money appropriated thereto by the State.

SEC. 7. That all Acts or parts of Acts inconsistent with this Act be, and the same are hereby, repealed.

Approved November 27th, A. D. 1889.

Police Regulation, Etc.

An Act to Incorporate Clemson College for the Purpose of Police Regulation and the Abatement of Nuisances.

SEC. 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly and by the authority of the same, that a municipal corporation is hereby created, known as Clemson College, the limits of which shall consist of all the lands belonging to the said college and cover all the territory included in a circle formed with the college building as a center, with a radius of five miles, thus making the diameter of the circle ten miles, within which boundaries the jurisdiction of the corporation shall extend.

SEC. 2. (1) That the Board of Trustees of Clemson College and their successors in office shall have perpetual control and direct the affairs of said corporation.

(2) That said Board, by a majority vote, shall have the power, and it is made their duty, to recommend a suitable person as Police Magistrate, who shall be commissioned by the Governor, and who shall exercise all the powers of a Trial Justice and of a City Recorder in punishing offenses against the law, or against the ordinances of the said Board of Trustees.

SEC. 3. That the said board of trustees shall have authority, and it shall be their duty, to make such rules for the maintenance of order and provide such punishments, within the jurisdiction of a Trial Justice, by fine or imprisonment, or both, as will keep the territory within their jurisdiction free from nuisances and enforce the police regulations of the State.

SEC. 4. That the said board shall have authority to appoint one or more special constables, who shall exercise all the power of the State constable or of a municipal policeman, to enforce obedience to its ordinances and to the laws of the State.

SEC. 5. That nothing herein contained shall give said board of trustees the right to levy or collect any tax.

SEC. 6. That all Acts and parts of Acts, and all charters, in conflict with this Act, be, and the same are hereby, repealed: Provided, that the charter of the town of Pendleton is not hereby repealed.

Approved December 24th, A. D. 1894.

Duties of the Trustees, etc.

(XX Stat., 705.) Act Devolving the Duties of the State Board of Agriculture upon the Board of Trustees of Clemson College and Appropriating the Privilege Tax.

52 An Act to abolish the Department of Agriculture and the Office of Commissioner of Agriculture, and to Devolve all their Powers and Duties on the Board of Trustees of "The Clemson Agricultural College of South Carolina," Except the Control of Phosphate Interests of the State.

SEC. 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by authority of the same, that the Department of Agriculture of this State as now constituted, and provided for by law, be, and the same is hereby, abolished, and also the office of Commissioner of Agriculture for this State.

SEC. 2. That all the powers, duties, rights and privileges now vested in and exercised by the Commissioner of Agriculture and the Department of Agriculture of this State be, and the same are hereby, vested in and devolved upon the Board of Trustees of the Clemson Agricultural College of South Carolina, except that said Board shall not have powers or privileges in reference to or in connection with the management and control of the rights and interests of this State in the phosphate rock or phosphate deposits in the navigable streams and in the marshes thereof; Provided, that nothing herein contained shall constitute the Trustees of the Clemson Agricultural College Trustees of the University of South Carolina.

SEC. 3. That for the purpose of carrying out the duties hereby devolved upon them, the said Board of Trustees of "The Clemson Agricultural College of South Carolina" shall meet at the call of the Governor, and at such time and place as he may designate. They shall receive no compensation, but shall be allowed the sum of three dollars per diem and three cents per mile for every mile actually travelled while engaged in the duties of the Board imposed upon them by this act.

53 SEC. 4. That the said Board of Trustees of "The Clemson Agricultural College of South Carolina," or a committee thereof appointed by them, shall supervise and enforce the execution of all laws respecting the sale of commercial fertilizers within this State, or any other duties hereby devolved upon them. The said Board shall also appoint a special inspector or inspectors of fertilizers, and such other persons as they may deem necessary for the carrying out of the duties of the Department of Agriculture hereby devolved upon them, and fix their compensation.

SEC. 5. That immediately after the approval of this Act, it shall be the duty of the Department of Agriculture to transfer and deliver to the Board of Trustees of "The Clemson Agricultural College" of South Carolina all books, papers, leases, records and other papers or

property pertaining to said Department, except the books, papers, cases, records and other things pertaining to the phosphate interests of the State.

SEC. 6. That all the privilege tax on fertilizers now required to be paid to the Commissioner of Agriculture shall in the future be paid to the Treasurer of the State, subject to the order of the Board of Trustees of the Clemson Agricultural College of South Carolina; and so much of the money so received as shall be necessary to defray the expenses of the Board in performing the duties now, by this Act, devolved upon them shall be thus used, and the balance shall go to the Clemson Agricultural College of South Carolina for its erection and maintenance.

SEC. 7. That all Acts or parts of Acts inconsistent with the provisions of this Act be, and the same are hereby, repealed.

Approved December 24th, A. D. 1890.

Sale of Agricultural Hall, etc.

Act Providing for the Sale of Agricultural Hall and Experiment Station and Appropriating the Proceeds Thereof. (XX Stat., 707.)

54 An Act to Provide for the Sale of the Lot and Building Known as Agricultural Hall, the Fish Pond Lot, and the Agricultural Experiment Stations, with their Personal Property, at Columbia and in Darlington and Spartanburg Counties, and to Appropriate the Proceeds Thereof.

SEC. 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the Commissioners of Sinking Fund be, and they are hereby, authorized, empowered and required, at public sale, at such time and on such terms as may seem to best subserve the interests involved, to sell and convey all the right, title and interest of the State of South Carolina (the same being a fee simple title) of, in and to the following property, to wit: That certain building in the city of Columbia, with the lot on which it stands, known as Agricultural Hall; that four-acre lot in said city known as the Fish Pond tract or lot; that tract of land known as the Experimental Farm at Columbia, with the personal property belonging thereto; that certain farm and tract of land, containing two hundred and twenty-seven 21-100 acres, in the County of Darlington, known as the South Carolina Agricultural Farm and Station, in Darlington County, together with the personal property thereon and appertaining thereto; and that certain tract of land in Spartanburg County, near the city of Spartanburg, containing 14 4-100 acres, more or less, with the buildings and with the personal property thereunto belonging, known as that part of the South Carolina Agricultural Farm and Station situated in Spartanburg County, to which the State has an absolute title: Provided, no sale shall be made until the property has been advertised for thirty days in at least one paper

in the counties in which the different pieces of property are situated, and then offered at public outcry.

55 SEC. 2. That the proceeds of such sale or sales, whether in money or securities, shall be turned over to the State Treasurer, to be by him held subject to the draft or order, as the case may be, of the trustees of the Clemson College, for the use of the said Clemson College, to which college said proceeds are hereby appropriated: Provided, however, that the proceeds of the sales of the South Carolina Agricultural Farm and Station, and the personal property in Darlington County, shall be disposed of as follows, to-wit: The sum of twenty-eight hundred 25-100 dollars, with interest from January 1st, 1890, shall be paid to the County Treasurer of Darlington County for ordinary county purposes; the sum of seventeen hundred and twelve 13-100 dollars, with interest from January 1st, 1890, shall be paid to the County Treasurer of Florence County for ordinary county purposes; the foregoing sums to be the first paid, and then the balance of said proceeds to be deposited in the hands of the Treasurer of Darlington County and subject to the drafts of the County Commissioners of Darlington, to repay and to refund to those individuals who paid to the State the sum of $5,000 to secure the location of said station in Darlington County to balance, with interest, if any, of their subscriptions thereto, respectively, not heretofore paid them by taxation, the proof of such balance of subscription to be made before the County Commissioners of Darlington County by each claimant satisfactory to said board before the issue of the draft on the Treasurer therefor; any remainder of said proceeds of sale to be paid to the State Treasurer, to be disposed of as the other funds arising from the other sales provided for in this Act.

SEC. 3. That in case any of said sales be in whole or in part on credit, and bonds, notes of purchasers and mortgages of the premises be taken as securities, such securities (except for the Darlington County Farm and Station and property) shall be made

56 payable to the Treasurer of the State of South Carolina, and his successors in office, and his and their assigns, and the State Treasurer may hold, sue in his own name and collect same, or assign same to said Trustees of Clemson College, at the option of said Trustees; and if the Darlington Farm and Station and its personal property be sold wholly or partly on time, a sufficient amount of securities taken shall be made payable to the County Treasurers of Darlington and Florence counties, respectively, to reimburse those counties as hereinbefore stated, and to reimburse those individuals mentioned in Section 2, for the balance and interest of their subscriptions not as yet repaid by taxation, any surplus to be made payable to the State Treasurer as to the other sales and securities.

Approved December 24th, A. D. 1890.

Mode of Drawing Money.

Act Regulating Mode of Drawing Money Appropriated to the State Institutions.

SEC. 724 (Code 1902, Vol. 1). The appropriation made for a State institution shall be paid to the Treasurer of the institution, who

shall be a bonded officer, the amount of the bond not to be less than the amount to be drawn at any one time, and to be fixed by the Governing Board, the bond to be approved by the Attorney General as to its form and execution, and by the Governor as to its sufficiency, and to be filed with the State Treasurer. The Treasurer of the institution shall draw his receipt warrant upon the Comptroller General for the amount needed, which receipt warrant shall be countersigned by the President or Superintendent of the institution, and have attached thereto an itemized sworn statement showing the purposes in detail for which the money to be drawn is to be used monthly only, and all money for other purposes to be drawn only when actually owing and due.

57 Upon the receipt by the Comptroller General of the receipt warrent, signed and countersigned, and with the statement attached as above provided, the Comptroller General shall issue his warrant on the State Treasurer in favor of the Treasurer of the institution for the amount drawn, and the State Treasurer shall pay the same, the amount thereof to be charged to the appropriation account of such institution by the Comptroller General and the State Treasurer.

As to Furnishing Convicts.

A Joint Resolution to Authorize and Require the Directors of the Penitentiary to Furnish to the Trustees of Clemson Agricultural College Fifty Convicts, and to Furnish to the Regents of the Lunatic Asylum Fifty Convicts, and to Furnish to the Trustees of the South Carolina Industrial and Winthrop Normal College One Hundred Convicts.

SEC. 1. Be it resolved, by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the Board of Directors of the South Carolina Penitentiary are hereby authorized and required, upon the order of the Board of Trustees of Clemson Agricultural College, signed by their President and Secretary, to furnish to said Board of Trustees able-bodied convicts, not to exceed fifty at any one time, and to that end to allow such convicts as are now on hand at said college to be retained and other such to be furnished to make up the said number of fifty, and fifty convicts to be furnished on the terms, conditions and restrictions contained in Section 5 of an Act entitled "An Act to Provide for the Building and Maintenance of the Clemson Agricultural College of South Carolina," approved December 23, A. D. 1889, except that these fifty convicts may be employed by said Trustees in diking Seneca River,

58 adjoining the College farm, and in such other work as to them may seem useful, for twelve months from the date of the approval of this Joint Resolution.

SEC. 2. That the said Board of Directors of the South Carolina Penitentiary are further authorized and required, upon the order of the Board of Trustees of the South Carolina Industrial and Winthrop Normal College, signed by their Chairman and Secretary, to

furnish to said Board of Trustees one hundred able-bodied convicts, said convicts to be employed in any and all work connected with said college; said convicts to be furnished until the work of building and finishing up said college is completed.

SEC. 3. That the said Board of Directors of the South Carolina Penitentiary are further authorized and required, upon the order of the Board of Regents of the Lunatic Asylum, to furnish said Board of Regents fifty able-bodied convicts during period between 10th day of July, 1894, and 1st day of October, 1894, said convicts to be employed to make brick for the purpose of building a new brick building for colored male patients.

Approved January 4th, A. D. 1894.

Authorizing Purchase of Land.

A Joint Resolution Authorizing the Trustees of Clemson College to Purchase the Tract of Land Belonging to Miss Lee, which Adjoins the Lands Now Belonging to Said College.

SEC. 1. Be it resolved by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, that the Trustees of the Clemson Agricultural College of South Carolina be, and they hereby are, authorized to purchase for the benefit of said College the lands now belonging to Miss Lee, and which adjoins the land on which the College is located: Provided, that they do not pay for the
59 same more than the sum of ten thousand dollars, in five annual installments.

SEC. 2. That for the purpose of making the first payment on same the sum of two thousand dollars is hereby appropriated from the funds of the State now in the Treasury not otherwise appropriated.

Approved January 4th, A. D. 1894.

Investments of Funds.

Resolutions Regulating Investments of all Funds Derived from Clemson Bequest and in the Hands of State Treasurer. (XX Stat., 662 and 1054.)

A Joint Resolution Providing for the Investment of all Funds in the Hands of the State Treasurer Under the Clemson Bequest and Directing him to Pay the Interest Arising Thereon to the Board of Trustees of The Clemson Agricultural College.

SEC. 1. Be it resolved by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, that the State Treasurer shall securely invest and reinvest the funds now in his hands and such as may hereafter come into his hands derived from the Clem-

son bequest in such manner as he shall be directed by the Governor, the Comptroller General and the Treasurer of the State, or any two of them.

SEC. 2. That the State Treasurer is hereby authorized to collect the interest annually upon all investments made of funds of the Clemson bequest, and pay the same over to the Treasurer of the Board of Trustees of Clemson Agricultural College.

SEC. 3. That it shall be the duty of the State Treasurer, under the direction of the Governor, the Comptroller General and the Treasurer of the State, or any two of them, to enforce the collection of the principal or interest due on any investments made of such Clemson bequest.

Approved December 23d, A. D. 1890.

60 *Sale and Investment.*

A Joint Resolution to Authorize the State Treasurer to Collect or Sell Evidences of Indebtedness Turned over to Him as Part of Clemson Bequest and Invest Same in Stock.

SECTION 1. Be it resolved by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, that the State Treasurer of this State be, and he is hereby, authorized and empowered to collect by suit or otherwise, or to sell and convert into money, all the evidences of indebtedness now held by him and which was turned over to him as a part of the Clemson bequest, and that when he shall have received the money on same that he invest the same in Brown Consols bearing interest at six per cent. per annum.

SEC. 2. That when said funds are invested in said Brown Consols, as provided for in the first section of this resolution, then the State Treasurer shall issue a certificate of stock in a sum equal to the face value of said Brown Consols, bearing interest at the rate of six per cent. per annum, payable semi-annually to the Board of Trustees of the Clemson Agricultural College, to be held as a perpetual fund, the capital of which shall forever remain undiminished, the interest on same to be used by said Board of Trustees for the uses of said Clemson Agricultural College, and when the said State stock is so issued he do then cancel the said Brown Consols in the place of which the said State stock was issued.

Approved December 22d, A. D. 1891.

Building and Maintenance.

Act to Provide for Building and Maintenance of Clemson College, and also Vesting Hatch and Land Script Funds in the Six State Trustees.

(XX Stat., 299.) An Act to Provide for the Building and
61 Maintenance of the Clemson Agricultural College of South Carolina.

SEC. 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, that one-half of the Land Script fund heretofore vested by Section 1045 of the General Statutes in the Board of Trustees of the University of South Carolina be, and the same is hereby, vested in the six members of the Board of Trustees of the Clemson Agricultural College of South Carolina elected by the General Assembly; and the State Treasurer is hereby authorized and required to take up and retire the certificate of State stock heretofore issued to the Board of Trustees of the said University, in the sum of one hundred and ninety-one thousand eight hundred dollars, according to the provisions of Section 1045 aforesaid; and the State Treasurer is hereby authorized and required, on or as soon after the first day of July, A. D. 1890, as this Act shall take effect, to issue a certificate of State stock in the sum of ninety-five thousand nine hundred dollars, bearing interest at the rate of 6 per cent. per annum, payable semi-annually, to the six members of the said Board of Trustees of the said Clemson Agricultural College, to be held as a perpetual fund, the capital of which shall forever remain undiminished, the income of said fund to be used by said Board of Trustees for the building and maintenance of the said Clemson Agricultural College in accordance with the purposes for which the said Land Script was donated by the Acts of Congress of the United States in relation thereto: Provided, that the State Treasurer shall issue, and he is hereby authorized and required to issue, to the Board of Trustees of the University of South Carolina a certificate of State stock in the sum of ninety-five thousand nine hundred dollars, bearing interest at the rate of 6 per centum per annum from July 1st, A. D.
62 1899, payable semi-annually, to be held as a perpetual fund, the capital of which shall forever remain undiminished, the income of said fund to be used by said Board of Trustees for the use and maintenance of the South Carolina Agricultural College and Mechanics' Institute, now in operation for the benefit of colored students, as set forth in Section 1046 of the General Statutes.

SEC. 2. That the annual grant of fifteen thousand dollars, commonly known as the Hatch Bill Fund, made to the State of South Carolina by the Congress of the United States, according to the terms of an Act of Congress entitled "An Act to Establish Agricultural Experiment Stations in Connection with the Colleges Established in the Several States Under the Provisions of an Act Approved July second, eighteen hundred and sixty-two, and of the Act sup-

plementary thereto," approved March 2d, 1887, be, and the same shall be, on or as soon after the first day of November, A. D. 1890, as this Act shall take effect, withdrawn from the control of the Board of Trustees of the University of South Carolina, in whom it was vested by an Act entitled "An Act to Amend Chapter XX of the General Statutes, entitled 'Of the University of South Carolina,'" approved December 22, 1887, and the said grant of fifteen thousand dollars is hereby vested in the six members of the Board of Trustees of the Clemson Agricultural College of South Carolina chosen by the General Assembly, and an agricultural experiment station shall be established in connection with said Clemson Agricultural College, and under the direction of the Board of Trustees thereof, to be supported by said grant according to the provisions of the Act of Congress hereinbefore mentioned.

As to Morrill Fund.

SEC. 1299 (Code 1902, Vol. 1). All sums which shall be received by the State from the United States Government under the
63 provisions of the Act of Congress, approved August 30, 1890, entitled, "An Act to apply a portion of the public lands to the more complete endowment and support of colleges for the benefit of agriculture and mechanical arts established under the provision of an Act of Congress approved July second, eighteen hundred and sixty-two," shall be equally divided between the colored Normal, Industrial, Agricultural and Mechanical College and the Clemson Agricultural College, to be applied to the purposes specified in said Acts.

Extracts from the Minutes of the Board of Trustees

(Pages 136-7, April 20, 1894.)

Col. W. A. Neal, Superintendent of Penitentiary, appeared before the Board and made a proposition relative to the convicts granted the college by the last General Assembly, and after discussion Mr. Donaldson offered the following resolution, which was adopted:

Resolved, That when the Board of Directors of the Penitentiary shall have agreed to the proposition to furnish sufficient convict labor to the work of building the dikes necessary to protect the bottom lands of Clemson College, without expense to the college, except that the feeding said convicts while engaged in the construction of said dikes, the President of the Board of Trustees is hereby authorized and directed to enter into and sign a contract, on behalf of the Board of Trustees, for and in consideration of said agreement, to release the convicts now at Clemson College to the Superintendent of the Penitentiary on demand.

(Page 157, January 22, 1895.)

Resolved, That Prof. Tompkins make a survey and prepare plans and specifications for raising the dike and report upon its feasibility

to the Ex. Com. through the President, in whose discretion it shall be as to whether the work shall go on.

64 (Page 162, May 1, 1895.)

Resolved, That Lt. Donaldson be requested to assist Prof. Tompkins in the matter of the survey of the dikes, and that they report to the Executive Committee.

(Page 176, January 22, 1896.)

Resolved, That Maj. Bradley be added to the committee on surveying and building the dike; that the committee be empowered to employ the services of a thoroughly competent civil engineer if they deem proper; and having carefully located the dike along the best route, cheapness, feasibility and durability being considered, to press the dike to a finish.

(Page 190, Aug. 5, 1896.)

Mr. Cunningham and Mr. Neal, of S. C. Penitentiary, appeared before the Board and had a friendly conference in regard to the convicts in dispute, and it was resolved that a committee of three (Wannamaker, Ellerbe and Donaldson) be appointed with authority after the dike has been completed to make such a disposition of the convicts as the best interests of the college may permit.

(Page 192, Aug. 5, 1896.)

Resolved, — Messrs. Bradley and Donaldson be paid for their extra services in the supervision of the dike.

(Page 195, Dec. 14, 1896.)

That Messrs. Donaldson and Bradley be paid $25, balance due them as a remunerative for supervising the dike.

(Page 199, March 10, 1897.)

Resolved, That the authorities ask for eighteen (18) convicts and that eight (8) be employed on the farm and eight (8) on the dike until finished, and that all permanently disabled convicts be returned to the penitentiary.

(Page 363, June 10, 1903.)

Resolved, That President Mell be instructed to have a survey made by the Math. Department of the dike for the purpose of
65 submitting estimates of the work necessary to be done to afford protection to the bottom land on the college property, the cost of the estimate to be based on the work of the recent flood.

(Page 372, March 9, 1904.)

Resolved, That Messrs. Simpson, Smythe and Bellinger be appointed a committee to investigate and report the legal status of the college in the matter of the dike *vs.* other land owners and as to power of college to condemn the land liable to be condemned, and that the Ex. Com. be requested to employ a competent engineer to investigate the probable damage likely to occur and to obtain option on land probable to be damaged.

(Pages 376-7, June 6, 1904.)

Resolved, That the Executive Committee be authorized to begin as soon as practicable the restoration of the dike on Seneca River for the protection of the bottom lands belonging to the college, following the plans suggested by Messrs. Ladshaw & Ladshaw. The engineering work shall be under the supervision of Profs. Brodie & Houston and that the sum of $2,000, if so much be necessary, be appropriated for such work.

Upon the passage of the resolution to re-build the dike, Mr. Simpson stated his reasons for voting against the resolution as follows: He opposed the resolution because we will subject the Board of Trustees and the State's property to suits for damages, and because if we should attempt to purchase the adjacent lands across the river we would have to pay more for it, if we begin to build the dike now.

(Page 397, June 5, 1905.)

Resolved, That President Mell have prepared and submitted to this Board at the July meeting an estimate of the number of cubic yards of earth that will be necessary to raise and widen the dike so that it will absolutely protect the low grounds from overflow.

66 Mr. Evans, resolved, further, That Executive Committee be instructed to report at the July meeting whether it will be practicable and economical to bring earth from hill by wire cable and at what cost for wire, etc.

(Page 409, July 11, 1905.)

Report of Mr. Brodie upon dike was read by Ex. Committee and it was resolved that the report of Prof. Brodie submitted by the Ex. Committee be referred back to Committee with the request that they submit their own report and recommendations as to the proper course to be adopted and report, said report to be submitted to the Board at its meeting to-morrow.

Extracts from the Minutes of the Executive Committee.

(Page 140, June 7, 1904.)

And the Committee ordered that Messrs. Bowen & Donaldson be authorized to treat with Dr. Hopkins for the purchase of his land.

Resolved, That Mr. Lewis is hereby instructed to put his convicts to work filling in breaks in dike under the direction of Prof. Brodie--commencing with the lower dike.

Mr. Lewis is authorized to build this dike at the exclusion of all other ordinary work.

That Dr. Mell is hereby authorized to have the work done in repairing the dike according to the plans and specifications of Messrs. Ladshaw & Ladshaw, and he is hereby authorized to settle all bills for same out of the money appropriated by the Board for this work.

(Page 139, March 10, 1904.)

Messrs. Donaldson & Bowen were requested to find out prior to June meeting of Board at what price and upon what conditions lands liable to be damaged by the dike may be purchased and to secure options on same.

(Pages 138-9, Nov. 2, 1903.)

The Board met and resolved that the Chairman of the
67 committee arrange with Ladshaw & Ladshaw, of Spartanburg, S. C., on such terms as he may approve, to make a professional examination of the condition of the college dike, water protection, etc.

Col. Donaldson was authorized to confer with owner of land across the river and ascertain price of land.

(Page 138, October 15, 1903.)

Mr. Norris explained that he had called the meeting to take into consideration the matter of the dike, as the full Board will not meet until March, too late to take steps to protect the crops of 1904.

(Page 107, Nov. 11, 1894.)

Resolved, That a committee be appointed to confer with Superintendent of Penitentiary after careful examination of dike and ditch in regard to finishing the same as agreed upon. (Messrs. Norris, Bradley and Bowen, Committee.)

By-Laws of the Clemson Agricultural College of South Carolina.

Article I.

SEC 1. The government of the College is vested in a Board of Trustees of thirteen members, as provided in the will of Thomas G. Clemson and the Acts of the Legislature.

SEC. 2. Seven members shall constitute a quorum for the transaction of business, but no appropriation of monies shall be made without the affirmative vote of nine members, and no election of any professor, teacher or employee shall be made except by the affirmative

vote of nine members, and seven votes shall be required to remove any member of the faculty, and such member, before removed, shall have a hearing before the Board, if the removal proposed is upon the charge of unfitness for his position.

SEC. 3. There shall be two regular meeting- of the Board of Trustees each year. The first shall be on the second Tuesday in
68 March, and the second on the Monday preceding the second Tuesday in June, which shall be commencement day. Extra meetings of the Board may be called by the President of the Board, or, in his absence or incapacity to act, by the Executive Committee.

SEC. 4. It shall be the duty of each member of the Board to be present at the regular and called meetings, and if any member shall leave before the Board adjourns without permission he shall receive no pay for his expense attending that meeting.

SEC. 5. The meeting of the Board shall be conducted orderly and in accordance with parliamentary usage, and the members shall conduct themselves decorously towards the President and towards each other while the Board is in session.

Article II.—Officers of the Board.

SEC. 1. The officers of the Board of Trustees shall be a President and a Secretary and Treasurer, who shall be elected by ballot every fourth year and shall hold their office for four years, and until their successors are elected, unless removed by death, resignation, or order of the Board, in which event the Board shall in like manner select a successor for the unexpired term.

SEC. 2. The President, who shall be a member of the Board, shall preside at the meetings of the Board, preserve proper decorum, decide all questions of order, subject to appeal to the Board, and shall appoint all committees unless otherwise ordered, and shall sign all contracts and obligations, ordered by the Board, execute all requirements placed upon him by the laws of the State, and he, with the Secretary, shall sign all acts of the Board requiring authentication. In the absence of the President or at his request the Board may call any member to the chair, who shall discharge the duties of the President *pro tempore*.

69 Article III.—Secretary and Treasurer.

SEC. 1. The Secretary and Treasurer shall keep the minutes of the Board, noting the names of the members present, and shall transcribe the minutes after their approval by the Board, and keep the same, with all books, orders, papers and documents, for the inspection of the members, but shall not suffer the same to be removed from his office, except when ordered to do so by the Board. He shall also keep a copy of the By-Laws for ready reference, and shall do such writing and correspondence as necessarily attaches to his office as Secretary of the Board, and shall sign, attest and affix the College seal to all contracts and obligations of the Board, when signed by the President of the Board, and sign and attest in like manner all papers, orders and acts of the Board requiring authentication.

SEC. 2. The Secretary and Treasurer shall be the financial and disbursing officer of the Board, and shall draw and receipt for all monies due or coming to the College or to the Board of Trustees, shall pay all bills, salaries of professors and other employees and other expenses as shall be ordered by the Board, and shall keep a correct account of all monies received or paid out, and shall make monthly statements when required by the Board, and shall, at such times fixed by the Board, make a full and complete statement of all receipts and expenditures during the year, to be transmitted to the Legislature, as required by law; he shall also make such investments as may be required, and shall diligently preserve such investments and property of the Board that may come into his hands, and shall pay out no monies, and only such money, except such as may be ordered by the Board. He, with the President of the College, shall sign all checks, and no money shall be paid out by him except upon a bill approved by the President of the College, and check signed by him, except bills for the expenses of the Board of Trustees, Board of Visitors, and committees, which bills shall be certified to as correct by the member rendering the same.

SEC. 3. The Secretary and Treasurer before entering upon his official duty as Treasurer shall give bond to the Board with such security as may be required in the penal sum of ten thousand dollars for the faithful discharge of his duties as Treasurer, and to be approved by the Finance Committee of the Board and be kept by the President of the College.

SEC. 4. He shall receive a salary of $100 per month.

Article IV.—Standing Committees.

There shall be the following standing committees, namely:

First. Fertilizer Committee.

Second. The Experiment Station Committee.

Third. The Executive Committee.

Fourth. The Finance Committee.

Fifth. Veterinary Committee.

Sixth. Entomological Committee.

The members of these Committees shall be elected at the regular meeting in March and shall hold offices for two years counting from March, 1902, or until their successors are elected.

First. The Fertilizer Committee.

The Fertilizer Committee shall be composed of three members. The Committee shall have charge of all matters connected with the Fertilizer Inspection Tax, and shall prescribe rules and regulations for a proper enforcement of the law bearing on this subject, and shall have charge of and direct the enforcement of all the duties devolved upon the Board of Trustees formerly performed by the Board of Agriculture in connection herewith. They shall appoint Inspectors, fix their pay, and do and perform any and all other matters in and about the premises as fully and to the same extent as the Board itself could do, except to employ a chemist or

chemists and clerk of the Department. All monies paid out for this Department shall be paid by the Secretary and Treasurer upon a bill or bills approved by the clerk of the Department and countersigned by the President of the College—the checks to be signed as other checks.

The clerk of this Department shall keep an accurate itemized account of all monies paid out upon bills of his approval, and shall submit the same to the Finance Committee to be audited and passed on quarterly.

The Committee shall meet as often as may be necessary upon the call of the chairman or upon the call of the other two members. The meeting may be held in such places as is most convenient. The clerk of the Department shall act as secretary of the Committee. He shall keep accurate minutes of the Committee's proceedings, which minutes shall be submitted to the Board at least once a year for inspection.

Second. Experiment Station Committee.

The Experiment Station Committee shall be composed of five members. This Committee shall act as an Advisory Board to the Director of the Station, but in no case shall it undertake to control or direct what experiments shall be made, or the manner of conducting them. But if the work of the Station and the character of the experiments are not planned and conducted in accordance with their conception of the law and rules of the Federal Department of Agriculture, or in what they regard as for the best interests of the people of the State, they shall report the facts to the Board, and the Board shall take such action thereon as it may see proper. This Committee shall meet at least twice a year and as often as it considers necessary for the betterment of the Station, or whenever requested by the Director of the Station. It shall have control and supervision
72 of all property belonging to the Station, which they shall inspect at least once a year. It shall closely inspect all the affairs of the Station, advise and counsel with the Director and shall report once a year to the Board the condition of the Station, its property, and also the work being conducted. It shall examine into the conduct and management of the Station staff and ascertain and report if the Director, Vice-Director, and all the heads of divisions are performing their duties and recommend such matters and things as will make the Station more progressive and useful. The Secretary of the Experiment Station shall act as Secretary to this Committee and shall keep accurate minutes of its proceedings, and submit these minutes to the Board at least once a year for inspection.

This Committee shall particularly examine into the issuing of bulletins and may report to the Board any default or neglect or extravagance in the execution of this matter or in any other matter.

Third. Executive Committee.

The Executive Committee shall be composed of five members. This Committee shall be an Advisory Board for the President of the College whenever he may desire to counsel with it, and the President

of the College may in emergencies request the committee to meet and confer with him. This committee shall have executed such buildings and improvements as the Board may direct them. Shall also be charged with the oversight of the College grounds and buildings and shall have the property kept in repair, and for this purpose may expend upon bills approved by the chairman of this Committee as much as five hundred dollars a year.

This Committee may meet when called by the Chairman or any two members, but it shall meet at least once a year and inspect the college property of every kind, including furniture, equipments, books, material, stock, barracks, laundry, infirmary, dwelling
73 houses, streets and roads and campus and report to the Board its findings; and shall report to the Board if its orders in reference thereto have been observed and carried out. The Secretary of the College shall be the Secretary of this Committee, who shall keep accurate minutes and report same to the Board.

Fourth. Finance Committee.

The Finance Committee shall be composed of three members. This Committee shall meet quarterly or as often as the Chairman or any two members may appoint. It shall quarterly examine into all books of accounts, both of the College and the Station, and ascertain if the money has been properly expended. It shall inspect the books and vouchers of the Treasurer. Shall examine into the financial affairs of the mess hall, the infirmary, laundry and clothing department and the books and vouchers of the Station. Shall contract for cadet uniforms and report their contract to the President of the Board to be reduced to writing and executed by him on behalf of the Board. It shall direct the bank or banks in which College funds shall be deposited, determine the amount of insurance on College property, and give direction in which companies policies of insurance shall be taken, and shall prepare and make the annual report to the Legislature as required by law.

The secretary of the College shall act as secretary of this committee and shall keep accurate minutes of its proceedings and submit the same to the Board for its information.

Fifth. Veterinary Committee.

This Committee shall be composed of three members. This Committee shall be charged with the enforcement of all of the provisions of the law in regard to the inspection of diseased animals as devolved upon the Board of Trustees by law. It shall have general
74 supervision and control of the Veterinarian in the performance of all duties devolved upon him by the Board of Trustees by law, or by the rules of this Committee. This Committee may make such rules as may be necessary for the guidance of the Veterinarian. The Veterinarian shall be required to render to the President an itemized account of all monies paid out by him for his traveling and other expenses while performing such work, together with a report of the places visited, and the nature of the services per-

formed. Such bills shall be submitted to the President and audited by him, and if found correct, he shall approve the same and turn them over to the Treasurer for payment. This Committee shall annually report to the Board at the regular meeting in June the amount necessary to meet the expenses of this Division for the ensuing year and shall make out a report of all work done by the Veterinarian during the year, and deliver it to the Finance Committee to be incorporated in the report to the Legislature.

Sixth. The Entomological Committee.

This Committee shall be composed of three members. This Committee shall have charge of the execution and enforcement of the law devolving upon the Board of Trustees, the inspection of fruit trees, vines, etc., and the prevention of plant diseases, etc. This Committee shall make rules for the guidance of the Entomologist assigned to this work by the Board, and shall require him to render to the President an itemized account of all monies paid out by him for traveling or other expenses, together with a report of the places visited and the nature of the work performed, and upon his approval, the said bills shall be paid, and this Committee shall report to the Board at their regular meeting in June the amount necessary to meet the expenses of this work for the next year, and at the same time, prepare and deliver to the Finance Committee, to be incorporated in the report to the Legislature, a full statement of the work performed by the Entomologist.

Article V. College Organization.

The College shall be divided into seven departments, namely: 1. Agricultural; 2. Mechanical; 3. Chemical; 4. Textile; 5. Academic; 6. Military, and 7. Sub-Freshman.

The Agricultural Department.

1. The Professor of Agriculture shall be the director of this Department, which shall be composed of the following divisions, namely: Agriculture, Horticulture, Botany and Bacteriology, Veterinary Science, Entomology, Dairying and Animal Husbandry, Geology and Mineralogy, and such others as may from time to time be added thereto. The director of this Department shall supervise the work of the several divisions therein, and see that the instructors are properly performing their several duties. He shall, after consultation with the several instructors, submit a report to the President for the Board of Trustees at the regular meeting in June, stating therein in items the amounts that will be required to meet the annual current expenses of each division, and for the Department generally. He shall make the requisitions and approve the bills for the expenditure of all monies for each division and for the Department. He shall require of the instructors of divisions in his Department faithful performance of all duties, and if they fail, or refuse to do so, he shall report them to the President of the Col-

lege, who shall report the same to the Board of Trustees at their first meeting thereafter.

The Mechanical Department.

2. The Mechanical Department shall be composed of the divisions of Mechanical Engineering, Woodwork, Forge and Foundry,
76 Machine Work, Physics, Drawing and Designing, and Electricity. The Professor of Mechanical Engineering shall be the director of this Department. He shall supervise the work and teaching of each division, and shall annually report to the President of the College, to be transmitted to the Board of Trustees, the conditions and wants of his Department, and after consulting with his assistants in the several divisions, submit an estimate of the amount required to meet the annual current expenses of each division and the Department generally. He shall make all requisitions for monies to be expended in his Department, and approve all bills for money expended. He shall give general instruction to his assistants in the matter of co-ordinating the work of these several divisions, and see that his assistants perform their duties correctly.

The Chemical Department.

3. This Department shall be composed of the instructors in the Chemical Laboratory.

The Professor of Chemistry shall be the director of this Department. He shall make all requisitions and approve all bills for money expended in his Department, and shall make to the President of the College an annual report to be transmitted to the Board for such amounts as may be required to meet the annual current expenses of his Department, and shall also report annually to the Board the condition of his Department.

The Academic Department.

4. The Academic Department shall be composed of the Professors, Associate Professors and Assistant Professors, of Mathematics, English, History and such other like branches of study.

The professors of each division shall annually report to the President of the College the condition of their several divisions and also furnish to him estimates of the annual current expenses required for the next year. This Department is under the direct supervision of the President.

77 The Textile Department.

5. The Textile Department shall be composed of all the Instructors in the Textile Building. The head of this Department shall be known as the Director of Textile Industry and his assistants shall be under his management and control. The said director shall annually make to the President of the College a report of his department and also an estimate of the current expenses required for the next year; and shall make all requisitions and approve all bills for money to be paid out by his department.

The Military Department.

6. The Military Department shall embrace the teaching of Military Science and Drill. The Commandant shall be the head of this department. He shall be charged with the enforcement of all rules and regulations for preserving order in barracks, shall supervise the mess hall, and all things pertaining thereto, and shall enforce and carry into effect all orders, rules and instructions issued by the President of the College, and shall make to the President of the College, from time to time such reports of the condition of the barracks, mess hall, and deportment as well as the management of and enforcement of discipline as he may require. Provided, however, the President of the College may if he deems advisable assign all of these duties except the teaching of Military Science and Drill to an Assistant Commandant and may issue all orders and receive reports directly from the Assistant Commandant.

No one shall make any rules for the government of the students except the President of the College, to be approved by the Board of Trustees.

The Sub-Freshman Department.

7. The Sub-Freshman Department shall be presided over by such person as the Board may appoint. He shall have
78 general supervision under the advice and control of the President of the College, of the management and mode of instruction, and also of the curriculum taught therein. The head of this department shall annually report to the President of the College the condition and wants of this division together with an estimate of the annual current expenses required for the next year.

In the catalogue the departments shall be set down in the following order: 1. Agricultural Department; 2. Mechanical Department; 3. Chemical Department; 4. Textile Department; 5. Academic Department; 6. Military Department, and 7. The Sub-Freshman Department, and the names, titles and subjects taught by each teacher shall be set down under their several separate departments, and when there is more than one assistant professor or instructor in any one department or division, or subject taught, they shall rank respectively in the order of their election. And the Experiment Station Staff, with the subject taught by each shall also be set down and stated separately.

Article VI. Officers of the College.

President of the College.

The President of the College shall have general supervision of all matters and things of every kind within and upon the College property pertaining to the College, and is charged with executing all orders and regulations of the Board of Trustees. He shall visit all shops and recitation rooms and require such changes in methods as will best advance the interest of the pupils and carry into effect the plans and purposes of the Board, and shall recommend the

changes therein as may appear necessary. He shall preside at all meetings of the Faculty, and may veto any action or finding of the Faculty; provided that he shall at the next meeting of the Board report the matter vetoed by time and his reason therefor.

79 He shall grant all absences of students and teachers as well as all other employees, and may suspend or dismiss any employee and may suspend any elected teacher for violation of the rules of the College or his instructions, or for leaving the College without permission. He shall reject or approve requisitions made by heads of Departments, provided that he shall not approve any requisition except there is an appropriation available for the specific object asked for. He shall see that all money is expended as ordered by the Board. He shall order paid all such bills as he has approved, and with the Secretary and Treasurer, sign all checks for the payment of money. He shall matriculate all students upon their admission to the College upon the payment of the required dues and fees, but shall collect no tuition fees from indigent boys as provided by the rules of the Board, and he shall keep a record of all names of boys matriculated as well as the names of their parents or guardian and their post office address, and shall keep himself informed concerning their proficiency and general deportment. He shall make rules for maintaining discipline in the barracks and see that such rules are enforced by the Commandant or Assistant Commandant, or by such persons as are entrusted with their enforcement. He shall also appoint temporary instructors to fill vacancies in the departments until the meeting of the Board, and in emergencies may employ temporary assistants for any of the departments.

He shall also employ all laborers in and about the College work, fix their pay and without his consent and approval no laborer shall be employed in any department or for any other purpose, and any employee who shall, without the consent and approval of the President, employ any laborer, said laborer shall not be paid by the Treasurer, but shall be paid out of the salary of the person so employing him. The President shall file with the Secretary

80 and Treasurer a roll of the employees authorized to be employed by him together with the rates of wages fixed, and every head of a department or other employee who was authorized by him to employ labor shall at the end of each month, report to the Secretary and Treasurer the time worked during the month and for what purpose. The President shall report to the Board at its June meeting a roll of the laborers employed in the College work, the rate of wages paid them, and the kind of work they are required to do.

No convict shall be employed for or by any person.

Hereafter it shall be the duty of the President of the College to keep an accurate record of the work of the professors, and other teachers of the College, giving particularly the following information:

The number of hours per week each one is employed in teaching and other work.

The text books used, classes taught, and progress made by each class.

The frequency of attendance upon Faculty meetings and chapel services. Work done during vacation.

Special notes of anything of a particularly meritorious nature, as well as actions that do not show loyalty or interest to the wishes of the Board of Trustees.

This record shall be kept in permanent book form for the information of the Trustees who shall examine it from time to time.

Each professor will also be permitted to examine his own record by permission of the President.

Commandant.

In all matters of discipline and control of the Cadet Corps, except in cases involving suspension or expulsion, the Commandant shall be empowered to act. And the Board will expect him to enforce order and good behavior and exercise all the power necessary to that end. He shall make such rules and regulations as
81 he may deem best subject to the supervision and paramount control of the President.

Article VII.

SEC. 1. The President, Directors, Professors and other Instructors shall be elected by the Board upon an affirmative vote of nine members and shall hold their positions during the pleasure of the Board, but no such President, Director, Professor or Instructor shall be removed except upon an affirmative vote of seven members.

They shall each receive such salary as is fixed by the Board and shall be paid monthly. The Directors, Professors, Associate Professors, Assistant Professors, and the head of the Sub-Freshman Department shall be members of the Faculty, and each one shall be charged with maintaining discipline in their division, and may report a student to either the head of his department or to the President of the College, as the case may be, and each may call the roll of his class promptly after the ringing of the bell and shall report all absences therefrom to the President of the College.

SEC. 2. The President of the College may call upon the Professors and other teachers to do work in other departments, if their time is not fully employed.

SEC. 3. Every employee of the College shall be required to work during vacation when called upon by the President without additional pay.

SEC. 4. Whenever an employee of the College absents himself without the permission of the President such absence shall be considered and treated as a resignation, and no such absentee shall again be permitted to enter the services of the College except by orders of the Board.

SEC. 5. If an employee shall be sick his salary shall not be discontinued unless such sickness continues for a longer period than one

month, and if said sickness continues for a longer period than
82 one month his salary for the first month of his sickness shall be paid, but not afterwards until he resumes his duties again.

SEC. 6. No employee of the College, absent from his duties with permission shall receive any pay for the time absent, except engaged in work pertaining to the College and except the period of absence is not more than three days.

Article VIII. Faculty of the College.

SEC. 1. The Faculty of the College shall consist of the President, Directors, Professors, Commandant, Associate and Assistant Professors, in the several Departments, and the heads of the Sub-Freshman Department.

SEC. 2. The Faculty shall meet at least once a week and whenever called by the President, and shall confer upon all matters for advancing the interest of the College and the Students, and transact all business in the interest of the College which may be referred to them by the President.

When a student shall be charged with an offence of a serious nature he shall be tried by the Commandant, Directors and Professors only; the President shall preside at such trial and shall vote only in case of a tie, and he may in his discretion set aside or modify the sentence thus imposed. Students may appeal to the Board of Trustees in all cases. All appeals shall be in writing and shall be forwarded to the Board through the President.

Article IX. Board of Visitors.

SEC. 1. There shall be a Board of Visitors consisting of seven citizens, one for each Congressional District of the State, chosen every two years by the Board of Trustees at their meeting in March, and they are charged with visiting the College the first Wednesday in May of each year, and institute a rigid inquiry into the condition and working of the College.

83 SEC. 2. The Board of Visitors shall have access to the lecture and recitation rooms, may examine Professors and others upon their methods of teaching, may inquire into the discipline and rules for enforcing it, and the mode of procedure of the Faculty and report to the Board at its annual meeting.

SEC. 3. The Board of Trustees may sit in secret session when this report is read, and no member of the Faculty shall be present at such session, and no member shall reveal anything said or done in said meeting. The report of the Board of Visitors shall be delivered to the Secretary and Treasurer of the College securely sealed, who shall deliver the same to the President of the Board.

Article X.

The traveling and other necessary expenses of the members of the Board of Trustees when attending meetings of the Board or performing special duties devolved upon them by the Board, and the traveling expenses of the Board of Visitors, attending the College to per-

form the duties devolved upon them, and the traveling expenses of the members of the standing committees and other committees when performing the duties placed upon them shall be paid by the Treasurer when itemized bills for the same, certified to as correct by the party in whose favor drawn shall be presented to him.

Article XI.

SEC. 1. The students and all members of the Faculty shall be required to attend Chapel services every morning, except Saturday, unless excused by the President of the College.

SEC. 2. The students are required to attend divine worship in the Chapel once every Sunday unless excused therefrom by the President.

Article XII.

SEC. 1. Tuition fees shall be paid to the Treasurer of the
84 College, who shall keep, disburse, and account for the same as other funds that may come into his hands.

SEC. 2. But no indigent student shall be required to pay tuition fees whose parents, guardian, or himself, if he has neither, shall furnish to the President of the College satisfactory evidence by affidavit, as furnished by the Board of Trustees, that he or she is unable to pay tuition, and if tuition be required they will be unable to send their son to College.

Article XIII.

Called or extra meetings of the Board of Trustees may be called by the President of the Board when necessary, and in case of his death, resignation, or inability to act, the Executive Committee may call an extra meeting of the Board in case of emergency.

General Provisions.

Admission of Students.

1. No one shall be admitted as a student in the College except he be a citizen of the State, and is of the age of sixteen years at the time of entering, and has stood a physical examination, and is free from contagious diseases including consumption: Provided, if a sufficient number of applicants from this State to fill the barracks do not apply, then students from other States may be admitted, and when so admitted, may continue in College until they complete their course.

Appropriations.

2. No money shall be paid out of the Treasury of the College except upon appropriations made by the Board of Trustees for specific purposes named (except as hereinafter provided), and upon itemized bills approved by the President of the College, (except as hereinafter provided), and the President shall approve no bills unless it be

clearly for the purpose named in the appropriation, and no
85 money appropriated for one purpose shall be expended for any other purpose; Provided, that so much of the money paid in by the students for their board, washing, lights, heat, and uniforms, as may be necessary for the same, may be paid by order of the President of the College upon bills approved by him, without an appropriation for said purposes. All sums appropriated and all balances of appropriations not expended at the end of the College year shall at that time be covered into the Treasury, and shall be no longer subject to be expended thereunder.

The President of the College shall approve all bills, except bills for the expense of travel of members of the Board of Trustees, and members of the Board of Visitors, which last shall be certified to as correct by each member of said Boards, and bills so approved, or certified to as above, and no others shall be paid by the Secretary and Treasurer; Provided, the check drawn in payment thereof be first signed by the President of the College, and then by the Secretary and Treasurer. The signatures of both the President of the College and the Secretary and Treasurer shall be requisite on all checks to render the same valid.

All bills for labor shall be particularly itemized and shall set forth the name of the laborer, length of time worked, the character of the work performed and for whose benefit, and the price per day or month, and unless so itemized shall not be approved.

When bills against the College are presented to the President for his approval the party in whose favor the requisition for the articles named in said bill was made, or the party whose duty it is to O. K. said bill, shall also endorse on the back thereof the following: "A specific appropriation was made for the articles herein under the head of appropriation for —— (naming the specific appropriation) and a requisition therefor was approved."

86 Repeals.

3. All by-laws, rules, orders heretofore adopted or enforced that are inconsistent with these by-laws are hereby repealed.

Amendment.

4. These By-Laws may be amended or added to by a two-thirds vote of the members present.

Experiment Station.

5. The President shall preside at all meetings of the Station Staff, shall approve or reject requisitions, approve bills authorized by him, and see that no money is expended except as ordered by the Board, and with the Secretary and Treasurer sign all checks in payment of money ordered paid.

6. The Professor of Agriculture shall be charged with all work of the Station, conforming the same to the law of Congress and rulings of the Department of Agriculture at Washington and the orders of this Board. He shall at the March meeting report through the Com-

mittee on Experiment Station the experiments conducted during the year, and what experiments he proposes to conduct during the ensuing year, with the amount necessary, and take the order of the Board thereon for the same. He shall have general supervision over all the Divisions of the Station and give general direction to the head of each.

Duty of Professors.

7. It is the duty of all Professors in the College to assist the Military Department in preserving order and discipline by reporting students who are known to be guilty of any improper conduct.

Legislation.

8. Members of the Faculty shall not attempt in any way
87 to influence legislation bearing directly or indirectly upon Clemson College, without first submitting their views to the Board through the President.

Services During Vacation.

9. The President of the College or the Board of Trustees have the right to call upon any professor, other teacher or employee of the College, during vacation, for services, without additional pay.

Professors.

10. It is the duty of the educator not simply to hear lessons, but to strive, both in and out of the class room, by all means at his command, to develop his pupils in mind and morals.

We want no hirelings at Clemson, and we recommend that the Board hereafter retain only those professors who manifest by their acts a genuine love for their work and a hearty interest in their pupils, especially in dull and backward boys who most need the encouragement of sympathetic teachers.

Portraits in Recitation Rooms.

11. It is the unanimous desire of every member of the Board to have the Presidents of the College hang their Portraits in the President's office, and that it would be gratifying to them to have each head of the departments hang their pictures in their recitation rooms.

Employment of Labor.

12. No professor or head of department, or instructor, or any other person employed by the College authorities, shall be authorized to employ any labor- or laborers, without the approval of the President in writing, and specifying the amount to be paid and the work to be performed. The said written approval to be put on file in the Secretary and Treasurer's office.

Appropriations and Requisitions.

13. The President of the College is hereby positively for-
88 bidden from approving any requisition for any department after the amount appropriated therefor has been expended. And all parts of appropriation not expended for the purpose for which the appropriation was made shall not be expended for any other purpose, and shall at the end of the College year revert to the treasury. The appropriations made by the Board of Trustees are intended to cover all expenses, and if an emergency shall arise the President may call the Executive Committee, who may provide for the same temporarily.

Agreement to Care for Property.

14. The President is hereby instructed to require of all persons who now or hereafter may occupy houses belonging to the College to enter into a written agreement, that if they resign their positions in the College or be dismissed therefrom, they will not destroy or remove, or suffer to be removed from the premises, any grass, trees, flowers or vines, growing thereon, nor damage, or suffer to be damaged, any fence, out-house or other fixture, except by the written consent of the President of the College.

Distribution of Dwellings.

15. The President of the College is authorized to make proper distribution of the dwelling houses on the campus.

Roads.

16. The President is authorized to permanently locate the roads and foot-ways on the campus, and the Professor of Horticulture shall put them in proper order.

Gardens.

17. The professors and other occupants of the houses on the premises are prohibited from using any grounds other than their gardens.

Stand-pipe Water.

18. No professor shall be allowed to use the water from the
89 stand-pipe except for drinking, washing and cooking. Anyone using it otherwise shall have the water cut off.

Board of Health.

19. The President, Dr. Sloan and Dr. Redfearn shall constitute a Board of Health, with power to abate any nuisance on the College grounds.

Change of Books.

20. No changes in text-books must be made without the written authority of the President of the College.

Divine Services.

21. The President of the College shall have authority to arrange for divine services in the chapel.

Inspection of Rooms.

22. The President or Commandant must inspect the barracks at least once a week, and the officers of the companies must inspect the same daily, and hold orderlies responsible for the cleanliness and good order of the rooms.

Department Accounts.

23. The Directors of each department of the College shall keep an exact account of receipts and expenditures, and shall file an inventory of all College property in each division in his charge every year, reporting any breakage or loss, by June 6th. And all persons when leaving the College shall take a receipt from some person in authority and deliver same to the President.

Diplomas.

24. The Trustees, President, Directors and Professors shall sign the diplomas.

Teachers' Institutes.

25. The President is instructed to see that hereafter representatives of the College attend as many of the Teachers' Institutes in the State as possible, to press upon the teachers the great importance of teaching the elements of agriculture in the common schools, and to suggest suitable text-books.

Duties of Surgeon.

26. It shall be the duty of the Surgeon of the College to carefully inspect from time to time the diet, and the requirements of the students, and also the sanitary regulations of the barracks and College grounds, and recommend to the President such changes as may be necessary for the health of the cadets, and it shall be the duty of the President to take immediate cognizance of all such recommendations.

The Physician to Clemson Agricultural College is requested to report the condition of seriously sick cadets to their parents or guardian at least every other day, and in cases of dangerous illness, each day.

Sale of Seed.

27. All wheat, rye and barley seed not required for seed by the Agricultural Department shall be offered for sale to the farmers of the State.

Bulletins.

28. The Agricultural Department shall prepare and issue at least six bulletins annually, covering the experiments in the department and may send out 30,000 of these publications to farmers in the State, if so many are demanded.

Disposal of Cattle.

29. It is the policy of the Board to keep Devons, Jerseys, Holsteins, Ayrshires and Watson cattle, and the Board hereby prohibits the disposal of any of these breeds without authority of the Trustees.

Sale of Calves at Fair.

30. All thoroughbred bull calves not needed at the College
91 for breeders shall be kept and offered for sale at the State Fair, annually, at auction.

Duties of Secretary and Treasurer.

31. The President shall require the Secretary and Treasurer to keep a separate account against each department, and of the money appropriated to the same, and to furnish a statement thereof whenever called for.

Buying and Selling.

32. No beef can be sold by the butcher to any person whatsoever, without authority from the President.

The baker shall not sell bread or any other article to any one, or give them away.

No person shall be allowed to buy supplies with the purchase made for the mess hall.

No subordinate or head of a department shall sell any of the products of his department without the written order of the President, and all such sales shall be reported to the Board.

Each head of Department, Division, Farm, or others having charge of College property and having anything whatever to sell or dispose of, shall first obtain the written consent of the President of the College therefor, or when any of said heads of departments, divisions, farm or others are ordered by the Board of Trustees to sell anything, they shall only sell the same for cash, and shall immediately turn over the same to the Secretary and Treasurer and take his receipt therefor, and if any Division or Department shall do any work for any other Department or individual a bill for the same shall be delivered to the Secretary and Treasurer, and by him shall be charged against said department's or individual's appropriation. The Secretary and Treasurer is hereby directed to keep a separate account with each department and the farm, entering therein monies received and from what source derived, and no person in the employment of the College shall hereafter have the authority to reinvest or expend any money except upon the appropriation made by the Board of Trustees.

92 *Ordinances.*

(Extracts from the Statutes of the State of South Carolina.)

SEC. 1320. A municipal corporation is hereby created known as Clemson College, the limits of which shall consist of all the lands belonging to the said College, and covering all the territory included in a circle formed with the College building as a center, with a radius of five miles, thus making the diameter of the circle ten miles, within which boundaries the jurisdiction of the corporation shall extend. No dispensary shall ever be located at Calhoun.

SEC. 1321. The Board of Trustees of Clemson College and their successors in offices shall have perpetual control and direct the affairs of said corporation.

All ordinances adopted by the Clemson Agricultural College of South Carolina, for the preservation of good order within the incorporate limits of the territory under its jurisdiction shall begin in these words: Be it Ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina:

Said ordinance shall be transcribed in a book kept for that purpose and shall be signed by the President of the Board and Secretary and Treasurer of the Board and the corporate seal attached thereto. This book shall be kept by the Secretary and Treasurer in some convenient and accessible place for the convenience of all persons desiring to examine it; and copies of the ordinances when passed shall be posted in three conspicuous places.

Good Order.

Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: There shall be appointed by the Board of Trustees, one or more policemen in accordance with the Act of incorporation. They shall exercise all the authority conferred upon them by the said Act and other Statutes of the
93 State. They shall preserve order within the incorporate limits, especially upon the College grounds and the settlements contiguous thereto. To this end they shall arrest all offenders against the laws of the State and the ordinances of the Board of Trustees, and carry them before the Police Magistrate at Clemson College to be dealt with according to law and these ordinances.

Concealed Weapons.

2. Be it ordained by the Board of Trustees of Clemson Agricultural College of South Carolina: That it shall not be lawful for any one to carry concealed about their person, within the incorporate limits of said College any pistol, dirk, sword case, razor or pocket knife with a blade longer than three inches, or any brass knucks, or any other weapons of any kind, whether the same has been enumerated herein or not. Any one who may be found guilty of violating this ordinance, shall, upon conviction, be fined not more than one hundred dollars, or to be imprisoned not more than thirty days.

Drunkenness.

3. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: That any person found drunk upon the College grounds, or being drunk shall afterwards be arrested, and convicted of being drunk on the College grounds, or within the incorporate limits of said College, shall be imprisoned for not more than twenty days, or be fined not more than ten dollars.

Fast Driving and Riding.

4. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall be unlawful for any one to ride or drive otherwise than in an ordinary gait upon any of the drives upon the College grounds. Any one violating this ordinance, shall, upon conviction be fined not more than five dollars, or be imprisoned not more than ten days.

94 Disorderly Conduct.

5. Be it ordained by the Board of Trustees of Clemson Agricultural College of South Carolina: That all persons are hereby required to conduct themselves in an orderly manner when upon the College grounds or any place contiguous thereto, and disorderly conduct, profanity and obscene language are hereby prohibited. Any person violating this ordinance, shall, upon conviction, be fined not more than ten dollars, or be imprisoned not more than thirty days.

Loafers, &c.

6. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall not be lawful for any loafers to congregate anywhere upon the College grounds, or in the streets, or in the public road contiguous to the College grounds. Any one violating this ordinance shall be first ordered by the police or any officer of the College to move off the College grounds, and failing at once to do so, they or he or she shall, upon conviction, be fined not more than five dollars, or be imprisoned not more than ten days.

Female.

7. Be it ordained by the Board of Trustees of Clemson Agricultural College of South Carolina: It shall not be lawful for any female to be found anywhere near the barracks at night, or for such persons to congregate anywhere on the College grounds or parade the streets of the College grounds or the public road anywhere in sight of the College on Sunday or any other day. Any one violating any of the provisions of this ordinance shall upon conviction be fined not more than five dollars, or be imprisoned not more than ten days.

Picnic.

8. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall be unlawful for

95 any persons to picnic upon the College grounds and within one half mile of the main College building, without first obtaining the written permission of the President of the College. Any persons violating this ordinance shall be required by the policemen to move off, and failing to do so, they shall be arrested, and upon conviction of violating this ordinance, shall be fined not more than five dollars or be imprisoned not more than ten days.

Guard House and Prisoners.

9. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall be the duty of the Superintendent of the Stockade to prepare a room in the stockade inclosure to be known and kept as a guard house, and all persons sentenced to imprisonment under the ordinance of this Board, or who shall be held under arrest awaiting trial when they cannot give bond for their appearance for trial, shall be confined in said guard house, and said Superintendent shall securely guard and keep such prisoners and provide them with rations, and the Police Magistrate shall see to it that all persons so confined in said guard house shall be provided with necessary comforts, at the expense of the College.

Vagrancy.

10. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall be unlawful for any person or persons who have no visible means of support, to remain upon or frequent the College grounds. Any person violating this ordinance shall, for the first offense, be ordered by any College officer to move off and keep away, and if again found violating this ordinance, he, she or they shall be fined, upon conviction, not more than five dollars or be imprisoned not more than ten days.

96 Walk, Ride or Drive.

11. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall be unlawful for any person or persons to walk, ride or drive, or to allow his horse to travel outside of the road on the cultivated lands of the College or any other lands. Any one guilty of a violation of this ordinance shall be fined not less than one nor more than twenty dollars or be imprisoned not less than three nor more than twenty days.

Gambling.

12. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall be unlawful for any person or persons to play within these incorporate limits in any house, barn, kitchen, stable or other out-house, or in any street, highway, openwood, race-field or open place, at any game or games of chance, with cards or dice, or any gaming table, no matter how known or distinguished, under any conditions whatsoever. Any one convicted before the Police Magistrate of the violation of this ordinance shall be fined not less than five dollars nor more than one

hundred dollars, or be imprisoned not less than ten nor more than thirty days.

Sunday Desecration.

13. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall be unlawful for any person or persons, on Sunday, within these incorporate limits to engage in any public sports, as foot-ball playing, horse-racing, interludes or common plays or other games, exercises or sports. Any person or persons so offending shall be fined, upon conviction before the Police Magistrate, not less than five dollars nor more than one hundred dollars, or be imprisoned not less than five nor more than thirty days.

97 Hunting and Fishing upon College Property.

14. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: That it shall be unlawful for any person to hunt or fish or to kill or entrap any bird or fish anywhere within or upon the College grounds or property, or to chase any animal or fowl upon or within the College grounds, and any one violating this ordinance shall be fined not less than ten nor more than twenty-five dollars, or be imprisoned not less than ten nor more than twenty-five days.

Authority of Police Magistrate.

15. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: That the Police Magistrate appointed for the incorporation of Clemson College under the Statute of the State incorporating the same shall have authority to issue his warrant for the arrest of, or if in his sight to order the arrest of, any person who may be guilty of violating any of these ordinances. And it shall be his duty to try all offenders for violating any of the ordinances ordained by the Board of Trustees of Clemson Agricultural College and to sentence such as may be found guilty according to the provisions of the several said ordinances.

16. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: That it shall be unlawful for any one to inveigle or entice by any arts or devices, any person to play at cards, or any other game, or bear a share or part in the stakes or bet on the sides or hands of such as do play as aforesaid, or shall sell, barter or expose to sale, any kind of property which has been before sold, bartered or exchanged by the person so selling. Any such person or persons convicted of the violation of this ordinance shall be fined not less than five nor more than one hundred dollars, or imprisoned not more than thirty days.

98 Omnibus.

17. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: That it shall be unlawful for any person or persons to commit any assault and battery upon another person, to kidnap any minors or illtreat children or be guilty of cruelty to children, to set fire to any grass on the lands of this

incorporation without permission from the owners, or to carry fire on any such lands, to burn or cut frames of timber and untenanted houses, to commit larceny in any form, to buy and receive stolen goods, to obtain property by false pretense, to steal melons, fruit, grain or cotton from the fields, to enter any house without breaking with intent to steal, to use stock without owner's consent, to remove, destroy, or leave down fences, to rescue any trespassing stock, to wantonly injure any stock, to injure telegraph or telephone poles, to engage in any work or the sale of goods on Sunday, or to be guilty of any form of vagrancy. Any person or persons convicted of the violation of any or either of the above enumerated crimes shall be punished by a fine of not less than one nor more than one hundred dollars, or imprisoned not less than one nor more than thirty days.

18. Be it ordained by the Board of Trustees of the Clemson Agricultural College: It shall be unlawful for any one whomsoever to graze or permit any person to graze any horse, cow or any other animal on any part of the campus grounds now uninclosed. Any one convicted of the violation of this ordinance before the Police Magistrate shall be fined not more than ten or less than one dollar or be imprisoned for not less than five or more than thirty days.

19. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: That the President is authorized and empowered to locate all needed paths on the campus. Any person using or making other paths than those thus laid out shall be punished by fine or imprisonment, in the discretion of the Magistrate, not to exceed ten dollars or thirty days for each offense.

99

Entering Barracks.

20. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall not be lawful for any one whomsoever, except the members of the Board of Trustees and the members of the College faculty, or other College officers, and the policemen, to enter the barracks without a permit from the President of the College or Commandant, or unless in company with a Trustee or one of the faculty. Any one violating this ordinance shall, upon conviction, be fined not more than ten dollars or be imprisoned not more than fifteen days.

Camping on Grounds.

21. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall not be lawful for any one to encamp on the College grounds within one mile of the main building, except by permission of the Police Magistrate. Any one violating this ordinance shall, upon conviction, be fined not more than ten dollars or be imprisoned not more than fifteen days.

Sale of Liquors.

22. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: That it shall be unlawful for

any person to sell, or attempt to sell, or to bring, receive or conceal any spirituous liquors within the incorporate limits of Clemson College, except as allowed by law. Any person violating this ordinance shall, upon conviction, be fined not more than fifty dollars or be imprisoned not more than thirty days.

100 Sale of Liquor to Cadets.

23. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall be unlawful for any one to sell, or in any way sell or deliver to any student of the College within the incorporate limits, any spirituous or vinous or mait liquors. Any one offending against this ordinance shall, upon conviction, be fined not more than fifty dollars or be imprisoned not more than thirty days.

Sale of Vegetables, Melons, Etc.

24. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall be unlawful for any one to sell anywhere upon the College grounds, to students or others, any watermelons or other melons, apples, chestnuts, groundnuts or fruits or vegetables of any kind, without first obtaining the permission of the President of the College to do so; and, even then it will be unlawful to drive or stop their wagons on any part of the College grounds without permission in writing. Any one violating this ordinance shall, upon conviction, be fined not more than ten dollars or be imprisoned not more than fifteen days.

Shooting on College Grounds.

25. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: It shall be unlawful for any one to shoot any gun or pistol, or other firearm, anywhere upon the College grounds, within one-half mile of the main College building, except such shooting as may be ordered by the proper authority. Any one violating this ordinance shall, upon conviction, be fined not more than five dollars or imprisoned not more than ten days.

Defacing Property.

26. Be it ordained by the Board of Trustees of the Clem-
101 son Agricultural College of South Carolina: It shall be unlawful for any person or persons to trespass upon the grass plats or flower beds of the College grounds, to cut down, deface, mutilate, hitch horse or horses to or otherwise injure any of the trees, shrubs, grasses or flowers of said grounds, or to commit any other trespass upon any property of the College, real or personal. Any person convicted of the violation of this ordinance before the Police Magistrate shall be fined not less than five nor more than one hundred dollars or be imprisoned not less than five nor more than thirty days.

Cruelty to Animals.

27. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: That it shall be unlawful for any one to overload, overdrive, overwork, torture, torment, needlessly mutilate, cruelly kill, ill treat or to deprive of necessary sustenance or shelter, or to inflict unnecessary pain or suffering upon any animal, or to cause the same to be done, whether owner or one having charge of such animal. Any person convicted of the violation of this ordinance shall be punished by imprisonment not more than thirty days, or by fine not exceeding one hundred dollars.

Hunting on College Grounds.

28. Be it ordained by the Board of Trustees of the Clemson Agricultural College of South Carolina: That it shall be unlawful for any person in this incorporation to wantonly shoot, or entrap for the purpose of killing, or in any other manner destroy any bird whose principal food is insects; or take or destroy the eggs of any such birds, including the turkey buzzard, but especially the jack daw, the crow, the eagle and all hawks and the owls which prey upon other birds and English sparrows. Any person violating this ordinance shall, upon conviction, be fined not less than one nor more than one hundred dollars, or imprisoned not less than two
102 nor more than thirty days.

Executor's Deed.

STATE OF SOUTH CAROLINA:

To all whom these Presents May Concern:

I, Richard W. Simpson, Executor of the last will and testament of Thomas G. Clemson, late of the County of Oconee and State aforesaid, send greeting:

Whereas, the said Thomas G. Clemson, in and by his last will and testament, bearing date the sixth day of November, A. D. 1886, and in and by the codicil thereto, bearing date the 26th day of March, A. D. 1887, did, among other things, give and devise to the said Richard W. Simpson, as Executor therein named, the Fort Hill Plantation, hereinafter more fully described, together with all the residue and remainder of his property, of every kind and description whatsoever, after paying off certain legacies in the said will and codicil provided for together with any property which might revert to his estate, in trust, that whenever the State of South Carolina might accept the said property as a donation from the said Thomas G. Clemson, for the purpose of founding on the said Fort Hill plantation an Agricultural College, in accordance with the views expressed by him, the said Thomas G. Clemson, and more fully set out in his last will and testament and codicil thereto, of which acceptance, on the part of the said State, the Chief Justice of the said State should be the judge, that then the said Executor should execute the deed of the said property to the said State of South Carolina, and

turn over to the same all the other property given in the said will as an endowment of said institution, to be held as such by the said State, so long as it should devote the said property to the purposes of said donation, all of which will more fully appear by reference to the said will and codicil thereto attached, as the same will be found in the office of the Judge of Probate for the County of Oconee, in the State aforesaid.

103 And whereas, the said Thomas G. Clemson thereafter, to-wit, on or about the 26th day of April, A. D. 1888, departed this life, leaving in full force, and unrevoked, as said last will and testament and codicil, thereto annexed, which said will and testament and codicil were duly admitted to probate, in the office of the Judge of Probate aforesaid, on the twentieth day of April, A. D. 1888, and on the same day letters testamentary were duly issued to the said Richard W. Simpson, as Executor of the said last will and testament.

And, whereas, thereafter, the said State of South Carolina has, by acts of this General Assembly, duly approved by His Excellency, the Governor of the State, duly accepted the said property as a donation from the said Thomas G. Clemson, for the purposes and under the conditions contained in the said will and testament expressed, which acceptance has been signified and a practical carrying out has been commenced within three years from the date of the probate of the said will, as therein required, and the Hon. R. W. Simpson, Chief Justice of the said State, has determined and adjudged that such acceptance and practical carrying out is in accordance with, and a fulfilment of the requirements of the terms and conditions of the said will, and the said State of South Carolina now demands of the said Richard W. Simpson, that he should fulfil the trust devolved upon him as Executor, in and by the last will and testament and codicil, and execute the deed of the said property to the said State, and turn over to the said State all the property in said will given and devised, to be held as such by the said State, under the terms and conditions of the said will and *council*.

Now, know all men that I, the said Richard W. Simpson, executor of the last will and testament of the said Thomas G. Clemson, deceased, under conditions of the premises and in the fulfil-

104 ment of the trust and responsibility devolving upon me, in and by the last will and testament of the said Thomas G. Clemson, who in the exercise of all the powers therein conferred, and for and in consideration of the sum of five dollars to me in hand and duly paid, at and before sealing and delivering to these premises by the said State of South Carolina, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, assigned, transferred and set over, and do hereby grant, bargain, sell and release, assign, transfer and set over, unto the said State of South Carolina, in fee simple,

All that piece, parcel or tract of land, being a part of the original Fort Hill tract, situate, lying and being in the County of Oconee and State aforesaid, on the southern side of the public road leading from Pendleton, in the County of Anderson, to Ravenel's Bridge,

on Seneca River; butting and bounding on the north by the portion of the said Fort Hill tract assigned to Isabella Lee, as her one-fourth thereof, and now owned and possessed by her, the said public road intervening for a part of the way, on the west by Seneca River, and on the south by lands originally owned by A. T. Lewis, since divided and in part owned by M. R. Hunnicutt, J. P. Lewis and James Goldman, and having such shape, courses, etc., as are shown in a plat thereof made by M. S. McKay, surveyor, on the 21st day of October, A. D. 1873. The said tract hereby conveyed containing eight hundred and fourteen acres or less (814 acres).

And also all of the residue and remainder of the estate of the said Thomas G. Clemson, deceased, of every kind and description whatever which may remain after paying off the legacies provided for in the said will, and all cost, expenses and counsel fees attendant upon the administration and settlement of said estate, together with all property which may revert to the said estate, and any hereafter revert hereto.

105 Together with all and singly the residue, hereditaments and appurtenances to the said premises or any of them, belonging, or in any wise thereto incident or appertaining.

To have and to hold all and singly the said premises, unto the said State of South Carolina, and its assigns in fee simple forever, subject, however, to all and singly the uses, trusts, limitations and conditions hereinafter expressed and contained, that is to say,

In trust for the purpose of founding upon the Fort Hill plantation herein and hereby conveyed and hereinafter more fully described, an Agricultural College in accordance with the views, limitations and conditions set forth, contained and set forth in the last will and testament and codicil of the said Thomas G. Clemson, hereinabove referred to, and all holdings and balance of the said property is an endowment of said institution, under the terms and conditions in the said last will and testament and codicil.

In testimony whereof, I, the said Richard W. Simpson, Executor, as aforesaid, have hereunto set my hand and seal this the sixth day of March, in the year of our Lord one thousand eight hundred and ninety.

(Sd.) RICHARD W. SIMPSON,
Executor of Thomas G. Clemson.

Signed, sealed and delivered in presence of (the word "Also" being intervened before execution).

(Sd.) MILES M. HUNTER,
PAUL H. E. SLOAN, JR.

STATE OF SOUTH CAROLINA,
County of Anderson:

Personally appeared before me Miles M. Hunter and made oath that he saw Richard W. Simpson, Executor, within named, sign, seal and as his act and deed, deliver the within written deed, and

that deponent, with Paul H. E. Sloan, Jr., witnessed the execution thereof.

(Sd.) MILES M. HUNTER.

Sworn to before me this 6th day of March, 1890.

(Sd.) P. H. E. SLOAN, *N. P., S. C.*

106 *Deed of Floride Isabella Lee to the Clemson Agricultural College.*

THE STATE OF SOUTH CAROLINA:

Know all men by these Presents, That I, Floride Isabella Lee, of the State of New York, for and in consideration of the sum of ten thousand (10,000) dollars, to me in hand paid by The Clemson Agricultural College of South Carolina, of the State of South Carolina, (the receipt whereof is hereby acknowledged,) have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release, unto the said Clemson Agricultural College of South Carolina, and its assigns, all that certain piece, parcel or tract of land, situate partly in the County of Oconee and partly in Pickens County, in the State of South Carolina, on the Seneca River and on the public road leading from Pendleton to Ravenel's Bridge, over said Seneca River, adjoining the Clemson College lands which were devised to the State of South Carolina by Thos. G. Clemson, containing two hundred and eighty-eight (288) acres, more or less, and fully described in a plat thereof made by J. P. Smith, D. S., dated March 23d, 1894, and hereto attached, bounded by Clemson College lands on the south, on the west by Seneca River, on the north by lands of Aaron Boggs, Calhoun Land Co., and R. A. Cochran, and on the east by B. C. Crawford's land, it being a part of that tract of land originally owned by the late Hon. John C. Calhoun, and commonly known as Fort Hill tract of land, and which, after the death of the said John C. Calhoun, came into the possession of his widow, Mrs. Floride Calhoun, and under her will became the property of Mrs. Anna M. Clemson and her daughter, Mrs. Floride Lee, wife of Gideon Lee, and being that part of the said original Fort Hill tract of land that was set off and partitioned as the full share therein of the said Mrs. Floride Lee to her husband,
107 the said Gideon Lee, and to her daughter, the said Floride Isabella Lee, they being the sole and only distributees of the said Mrs. Floride Lee, and I do hereby ratify and confirm the division and partition so made; and on the 21st day of November, 1888, the said Gideon Lee conveyed his interest in the said tract of land to me, the said Floride Isabella Lee; wherefore I am now the sole and only owner thereof, the two hundred and eighty-eight (288) acres herein particularly conveyed, forming with the land devised to a trustee by Thos. G. Clemson for the benefit of the State of South Carolina for the purpose of establishing the said Clemson Agricultural College of South Carolina, very nearly the entire tract of land known as the Fort Hill or John C. Calhoun tract of land.

To have and to hold all and singular the said premises hereinbefore mentioned unto the said Clemson Agricultural College of South Carolina and its assigns forever.

And I do hereby bind myself and my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Clemson Agricultural College of South Carolina and its assigns against me and my heirs or any other person or persons lawfully claiming or to claim the same or any part thereof.

In testimony whereof I have hereunto set my hand and affixed my seal this the twenty-fifth day of May A. D. 1894.

FLORIDE ISABELLA LEE.

Signed, sealed and delivered in the presence of

——— ———.

STATE OF NEW YORK,
County of New York:

Personally appeared before me R. J. Hutton and made oath that he saw the within named Floride Isabella Lee sign, seal and as her act and deed, deliver the within written deed, and that he, with A. K. Lee, witnessed the execution thereof.

R. J. HUTTON.

Sworn to before me this 25th day of May, 1894.

THOS. Z. CLIFFORD.
206 *Broadway, New York. A Commissioner of Deeds for the State of South Carolina in New York.*

108 Filed 16th June, 1894, R. M. C. office, Pickens County, S. C. Recorded in Book "M." pages 328, 329 and 330. Examined by J. M. Stewart, Register Pickens County, S. C.

Deed of Mrs. Ella L. Lee to the Clemson Agricultural College.

THE STATE OF SOUTH CAROLINA:

Whereas, my husband, late of the State of New York, did convey to his daughter, Floride Isabella Lee, all of his right, title and interest in a tract of land, situate in Pickens and Oconee Counties, in the State of South Carolina containing two hundred and eighty-eight acres (288), more or less, adjoining lands of Aaron Boggs, Crawford and the late Thos. G. Clemson; and whereas, I failed or neglected to renounce and release my dower in said land, which I intended to do; and whereas, my said husband has since departed this life, and I still desire to renounce and release my dower in said land for the benefit of my step-daughter, the said Floride Isabella Lee, who has bargained and sold the same to The Clemson Agricultural College of South Carolina—

Now, know all men by these presents, That I, Ella L. Lee, widow of Gideon Lee, deceased in the State of New York in consideration of the

sum of five dollars, to me in hand paid, at and before the sealing of these presents, by The Clemson Agricultural College of South Carolina, in the State aforesaid, (the receipt whereof is hereby acknowledged,) have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release, unto the said The Clemson Agricultural College of South Carolina all my right, title and interest, particularly my dower to which I may be or am now entitled to in all that certain piece, parcel or tract of land of which my said husband, in common with his daughter, Floride
109 Isabella Lee, was seized and possessed at the time of his deed of his interest therein to his said daughter, dated the —— day of ——, 189—, situate, lying and being partly in the County of Pickens and partly in the County of Oconee, in the State of South Carolina, on Seneca River adjoining lands of Aaron Boggs, the late James Crawford, and the lands of the late Thos. G. Clemson, which he devised to the State of South Carolina for the purpose of having erected thereon an Agricultural College, and with which tract the land herein conveyed formed the original Fort Hill or John C. Calhoun tract of land, and containing two hundred and eighty-eight (288) acres, more or less, and being the land this day conveyed by the said Floride Isabella Lee to The Clemson Agricultural College of South Carolina.

Together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

To have and to hold all and singular the said premises before mentioned unto the said The Clemson Agricultural College of South Carolina and assigns forever.

And I do hereby bind myself and my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said The Clemson Agricultural College of South Carolina and assigns against me and my heirs, but against no other person lawfully claiming or to claim the same, or any part thereof.

Witness my hand and seal this 28th day of May in the year of our Lord one thousand eight hundred and ninety-four and in the one hundred and 18th year of the sovereignty and independence of the United States of America.

ELLA L. LEE.

Signed, sealed and delivered in the presence of two witnesses:

A. G. HILLER.
R. N. WHITLOCK.

110 THE STATE OF NEW YORK.
City and County of New York:

Personally appeared before me, R. N. Whitlock and made oath that he saw the within named Ella L. Lee sign, seal and as her act and deed, deliver the within written deed, and that he with, A. G. Hiller, witnessed the execution thereof.

R. N. WHITLOCK.

Sworn to before me this 28th day of May, 1894.

THOS. Z. CLIFFORD,
206 *Broadway, N. Y., A Commissioner of Deeds for the State of South Carolina in New York.*

Filed this 13th day of June, A. D. 1894, and recorded in Book R, pages 172, 173, 174, and certified.

JAMES SEABORN,
Register Mesne Conveyance, Oconee County, S. C.

Deed of Anna P. Lewis to The Clemson Agricultural College.

THE STATE OF SOUTH CAROLINA,
Oconee County:

Know all men by these presents, That I, Mrs. Anna P. Lewis, wife of J. P. Lewis, of Oconee County, in the State aforesaid, in consideration of the sum of four hundred and twenty ($420) dollars, to me in hand paid at and before the sealing of these presents by The Clemson Agricultural College of South Carolina, in the State aforesaid, (the receipt whereof is hereby acknowledged,) have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said The Clemson Agricultural College of South Carolina and assigns forever, all of that piece, parcel or tract of land situate, lying and being in the County of Oconee, and State aforesaid, containing fourteen acres, more or less, adjoining lands of the old Fort Hill tract, conveyed to the State of South Carolina by R. W. Simpson, Executor of Thos. G. Clemson, and other lands of myself, being a part of that tract of land, containing one hun-
111 dred and thirty acres, which was one of the two tracts of land conveyed by A. F. Lewis to John E. Lewis, trustee for O. Kate Lewis, and the heirs of Richard Lewis, by deed bearing date March 12th, 1872, and recorded at Walhalla in Clerk's office in Book "C," pp. 71, 72, 73, 74, and a part of the one hundred and fifty-six acres conveyed by J. Earle Lewis, Trustee, and O. Kate Lewis to Anna P. Lewis by deed bearing date March 4th, 1881, and recorded in same office, in Book G, pp. 394–395, and is set off on the plot of the 130 acre tract by dotted lines. The children of Richard Lewis and O. Kate Lewis having instituted proceedings in the Common Pleas for Oconee County against Anna P. Lewis to recover the said land, the controversy was compromised and the same was confirmed by the Court and by its order, recorded in Clerk's office at Walhalla in Book F, of Pleadings and Judgments, pp. 476 to 484, the title to the said land was confirmed in me. The fourteen acres herein conveyed is fully described by a plat thereof made by P. T. Brodie, June 3rd, 1903. On this plat the surveyor speaks of the land as belonging to J. P. Lewis. On the plat wherever J. P. Lewis appears it should be written Mrs. J. P. Lewis or Anna P. Lewis, and I guarantee that the land herein conveyed is free from any incumbrance and the fee simple title is in me.

Together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

To have and to hold, all and singular the said premises before mentioned unto the said The Clemson Agricultural College of South Carolina and assigns forever, for the uses and purposes and benefits of said College as fixed by law.

And I do hereby bind myself and my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said The Clemson Agricultural College
112 of South Carolina and assigns, against me and my heirs and all other persons whomsoever lawfully claiming or to claim the same or any part thereof.

Witness my hand and seal this 30th day of June, in the year of our Lord one thousand nine hundred and three, and in the one hundred and twenty-seventh year of the sovereignty and independence of the United States of America.

MRS. ANNA P. LEWIS. [L. S.]

Signed, sealed and delivered in the presence of
JAS. P. LEWIS,
GEO. E. TAYLOR.

THE STATE OF SOUTH CAROLINA,
County of Anderson:

Personally appeared before me Geo. E. Taylor and made oath that he saw the within named Mrs. Anna P. Lewis sign, seal and as her act and deed, deliver the within written deed, and that he, with James P. Lewis, witnessed the execution thereof.

GEO. E. TAYLOR.

Sworn to before me this 30th day of June, 1903.

P. H. E. SLOAN, [L. S.]
Notary Public, S. C.

Filed this 1st day of July, A. D. 1903, and recorded in Book AA., page 328.

C. R. D. BURNS,
Register Mesne Conveyance, Oconee Co., S. C.

Deed of Mrs. M. F. Mallonee to Dr. John Hopkins.

THE STATE OF SOUTH CAROLINA,
County of Oconee:

Know all men by these presents, That I, Margaret Frances Mallonee, of the city of Charleston, in the State aforesaid, in consideration of the sum of twenty-five hundred and twenty-five dollars, to me paid by Dr. John Hopkins, of Seneca City, in the State aforesaid, have granted, bargained, sold and released, and by these presents

do grant, bargain, sell and release, unto the said Dr. John
113 Hopkins all those two certain pieces, parcels or tracts of land, situate, lying and being in the county and State aforesaid, the one on Mill Branch, waters of Seneca River, adjoining lands now or formerly of R. S. Porcher and B. P. Sloan, and containing, according to a plat thereof by M. S. McCay, D. S., dated 4th September, 1871, one hundred and fifty acres, and the other on the west side of Seneca River, adjoining lands now or formerly of W. A. Lowery, B. P. Sloan and others, and containing, according to a plat thereof by M. S. McCay, surveyor, one hundred and thirty-three acres, dated 28th November, 1871, being the same conveyed to me 11th November, 1878, by J. W. Stribling, C. C. P.

Together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

To have and to hold all and singular the premises before mentioned unto said grantee and said grantee's heirs and assigns forever. And the said grantor does hereby bind the said grantor and the said grantor's heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said grantee and the said grantee's heirs and assigns against the said grantor and the said grantor's heirs and assigns and every other person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness my hand and seal this ninth day of January, in the year of our Lord one thousand eight hundred and eighty, and in the one hundred and fourth year of the sovereignty and independence of the United States of America.

MARGARET F. MALLONEE. [L. S.]

Signed, sealed and delivered in the presence of
JOHN J. MALLONEE,
CHARLES W. KEOGH.

STATE OF SOUTH CAROLINA,
County of Oconee:

Personally appeared before me Charles W. Keogh and
114 made oath that he saw the within named Mrs. Margaret Frances Mallonee sign, seal and as her act and deed, deliver the within written deed, and that he, with John J. Mallonee, witnessed the execution thereof.

CHARLES W. KEOGH.

Sworn to before me this ninth day of January, 1880.
[L. S.] B. J. McTUREOUS,
Notary Public.

Recorded in Clerk's office, Oconee County, S. C.
Mesne Conveyance Book "F," pages 570-1, and certified 19th of January, 1880.

J. W. STRIBLING,
C. C. P. & R. M. C.

Entered in Auditor's office, Oconee County, Book "A," page 87, 19th of January, 1880.

J. N. GEORGE,
A. O. C.

Judge's Decree.

STATE OF SOUTH CAROLINA,
County of Oconee:

In the Court of Common Pleas.

Dr. JOHN HOPKINS, Plaintiff,
against
THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, a Corporation Created by and Existing under the Laws of the State of South Carolina, Defendant.

Plaintiff in his complaint alleges that he is the owner in fee and in possession of a very valuable tract of bottom land on the west side of Seneca River, in the County of Oconee; that about the years 1894 and 1895, the Defendant, by its Board of Trustees, constructed on its land lying on the east side of Seneca River, and opposite the bottom lands of Plaintiff, a high and strong embankment or dike, for the purpose of preventing the overflow of the waters of Seneca River on its bottom lands in times of freshet or floods; that said embankment prevents entirely the accustomed overflow of said water upon the bottom lands of Defendant, and in times of freshet the entire volume of said water is thrown upon, and forced to flow with great volume and momentum upon Plaintiff's bottom land
115 aforesaid, whereby the Plaintiff's natural bank on Plaintiff's side, and the rich soil of his bottom lands were washed away; that said bottom lands of Plaintiff have been practically ruined and rendered sterile, to Plaintiff's damage in the sum of eight thousand dollars.

Wherefore, Plaintiff asks judgment against Defendant (1) for $8,000 and costs, (2) that Defendant be enjoined by the proper order of this Court to abate and remove said dike, and restore the conditions prevailing and existing prior to the construction of said dike; (3) and for such other and further relief as to the Court may seem proper.

The Defendant answered the complaint, alleging that the farm and land on the east side of Seneca River, described in the complaint, was the property of the State of South Carolina; that all actions done with reference to the erecting and maintaining said dike were done by said State through its agents and employees, duly authorized by the State, and that the Court has no jurisdiction in this action.

Counsel for Plaintiff and Defendant entered into a written agreement, by the terms of which it is provided that the jurisdictional issues raised by the Defendant shall be first determined, and then

the other issues in the case shall be tried, unless those issues are finally disposed of herein.

At the Winter Term of this Court the case came up for trial under said agreement, and both sides offered testimony relating to the jurisdictional issue, which will be found in the record herein.

The complaint alleges two causes of action, one for injunction, etc., on the equity side of the Court, and the other for damages on account of alleged injuries to lands of Plaintiff, by reason of a tort committed thereon by the Defendant. Water Power Co. *vs.* Electric Co., 43 S. C., 155.

116 By the will of Honorable Thomas G. Clemson, duly probated in the County of Oconee on the 20th day of April, 1888, he devised and bequeathed the Fort Hill place, consisting of 814 acres (the land upon which the dike involved in this action was constructed) and other property, real and personal, to his executor, "in trust that whenever the State of South Carolina may accept said property as a donation from me for the purpose of thereupon founding an Agricultural College, in accordance with the views I have hereinbefore expressed * * * then my executor shall execute a deed of the said property to the said State, and turn over to the same all property hereinafter given as an endowment of said institution, to be held as such by the said State so long as it in good faith devotes said property to the purpose of the donation * * *"

Item 2. "The following named gentlemen, seven in number, shall be seven of the Board of Trustees, to-wit: R. W. Simpson, D. K. Norris, M. L. Donaldson, R. E. Bowen, B. R. Tillman, J. E. Wannamaker and J. E. Bradley; and the State, if it accepts the donation, shall never increase the Board of Trustees to a number greater than thirteen in all, nor shall the duties of said Board be taken away or conferred upon any other men or body of men. The seven Trustees appointed by me shall always have the right, and the power is hereby given them and their successors, which right the Legislature shall never take away or abridge, to fill all vacancies which may occur in their number by death, resignation, refusal to act, or otherwise. But the Legislature may provide as it sees proper for the appointment or election of the other six Trustees, if it accepts the donation * * * The name of this institution is to be "The Clemson Agricultural College of South Carolina."

In the preamble to his will testator says: "I have determined to devote the bulk of my property to the establishment of an

117 Agricultural College upon the Fort Hill place. This institution I desire to be under the control and management of a Board of Trustees, a part of whom are hereinafter appointed, and to be modeled after the Agricultural College of Mississippi as far as practicable," * * * "But I desire to state plainly that I wish the Trustees of said institution to have full authority and power to regulate all matters pertaining to said institution, to fix the course of studies, to make rules and regulations for the government of the same, and to change them as in their judgment experience may prove necessary." * * *

By an Act of the General Assembly, approved November 27th,

1889, the State of South Carolina declares that it accepts the devisee and bequest of Hon. Thomas G. Clemson, subject to the terms and conditions set forth in his said will, "and that the Treasurer of the State be, and he is hereby, authorized and empowered to receive and securely hold the said property, both real and personal, and to execute all necessary papers and receipts thereafter, as soon as the said Executor shall convey and transfer the said devise and bequest to the said State." An Agricultural and Mechanical College was established in connection with the aforesaid devise and bequest, to be styled "The Clemson Agricultural College of South Carolina," "to be situated at Fort Hill, in Oconee County, on the plantation so devised." It is further provided that said College shall be under the management and control of a Board of thirteen Trustees, composed of the said seven members nominated by said will, and their successors, and six members to be elected by the Legislature; they shall organize the College and put it in operation, prescribe the courses of study, elect professors, * * * and make all rules and regulations for the government of the college; employ such superintendents, head workmen, laborers for the farm, shops and grounds
118 as may be necessary; charge tuition, etc.

Section 4 of said Act provides "That the said Board of Trustees is hereby declared to be a body politic and corporate, under the name and style of the Clemson Agricultural College of South Carolina. They shall have a corporate seal, which they may change at their discretion, and in their corporate name they may contract for, purchase and hold property, for the purposes of this Act, and may take any property or money given or conveyed by deed, devise or bequest to said College, and hold the same for its use and benefit * * * The Board may sell any of the personal property 'not subject to trust.' * * * They may sue and be sued, plead and be impleaded, in their corporate name, and may do all things necessary to carry out the provisions of this Act, and may make by-laws for this purpose if they deem it necessary."

In Section 6 of said Act this proviso appears: "And provided, further, that all personal property purchased with money appropriated by the State shall be taken and held as property of the State of South Carolina, and it shall be the duty of said Board of Trustees to make to the Legislature an annual report of the College, and of all farming operations and tests and experiments, and of all receipts and expenditures, with a statement of the condition of the property and funds of said College, and of all receipts and expenditures of money appropriated thereto by the State."

Pursuant to the power, and in discharge of the trust vested in him by the will of Mr. Clemson, on March 6th, 1890, the Executor thereof conveyed, in fee simple, the Fort Hill place and all the residue and remainder of the estate of testator (after payment of legacies) unto the State of South Carolina, "subject, however, to all and singu-
larly the uses, trusts, limitations and conditions hereinafter
119 expressed and contained"—that is to say, "in trust for the purpose of founding upon the Fort Hill plantation herein and hereby conveyed and hereinafter more fully described, an Ag-

ricultural College in accordance with the views, limitations and conditions set forth, contained and set forth in the last will and testament and codicil of the said Thomas G. Clemson, hereinbefore referred to, and all holdings and balance of the said property as an endowment of said institution, under the terms and conditions in the said last will and testament and codicil."

By a Joint Resolution, approved January 4th, 1894, the Legislature authorized the Board of Trustees to purchase the Lee lands of 288 acres, adjoining the Fort Hill place, for ten thousand dollars, and pay for same. On May 25th, 1894, a deed was made for this land by Floride Isabella Lee. Another small tract of fourteen acres, purchased and paid for by the State, was deeded to the College by Mrs. Anna P. Lewis, the price thereof being $420, and the date of the deed is June 30th, 1893.

On the 23d day of December, 1889, the Legislature passed an Act providing for the building and maintenance of Clemson College, and vested one-half of the Land Scrip and Hatch funds, and what is known as the Morrill fund, in the six Trustees elected by the State, the income for the support of the College. The only other source of income of the College is the fertilizer tax. This tax is paid to the State Treasurer, subject to the order of the Trustees. The Act of December 24th, 1890, so provides, and all monies appropriated to public institutions are paid by the State Treasurer. Sec. 724, Code of Laws of S. C., 1902.

By a Joint Resolution approved December 23d, 1890, entitled "A Joint Resolution Providing for the Investment of all Funds in the hands of the State Treasurer, under the Clemson Bequest, and Directing him to pay the interest arising thereon to the Board of Trustees of the Clemson Agricultural College," the State Treasurer is directed to invest and re-invest the funds now in his hands and such as may come into his hands, derived from the Clemson bequest, in such manner as he shall be directed by the Governor, the Comptroller General and the Treasurer of the State, or any two of them, and the State Treasurer is to collect the interest on said funds and pay them to the Treasurer of the Board of Trustees.

By a Joint Resolution approved December 22d, 1891, the State Treasurer is authorized to collect all the evidences of indebtedness now held by him and which were turned over to him as a part of the Clemson bequest, and invest the same in Brown Consols bearing interest at the rate of six per cent. per annum.

On December 24th, 1890, the General Assembly approved "An Act to Abolish the Department of Agriculture and the Office of Commissioner of Agriculture, and to devolve all their powers and duties on the Board of Trustees of 'The Clemson Agricultural College of South Carolina,' except the control of phosphate interests of the State."

The Act prescribing the duties of the Board of Trustees, and the last Section thereof, enacts "That all the privilege tax on fertilizers, now required to be paid to the Commissioner of Agriculture, shall in the future be paid to the Treasurer of the State, subject to the

order of the Board of Trustees of the Clemson Agricultural College of South Carolina * * * for its erection and maintenance."

The dike in question was built on the eight hundred and fourteen acre tract conveyed, as heretofore stated, by the Executor of Mr. Clemson to the State. By a Joint Resolution, approved January 4, 1894, the Board of Directors of the South Carolina Penitentiary were authorized to furnish convicts to the said Board of
121 Trustees, and providing that fifty convicts be employed by said Trustees in diking Seneca River.

A municipal corporation, known as Clemson College, was created by "An Act to incorporate Clemson College for the purposes of police regulation and the abatement of nuisance," approved December 24th, 1894. "The limits of said corporation * * * is a circle formed with the College building as a centre, with a radius of five miles, thus making the diameter of the circle ten miles, within which boundaries the jurisdiction of the corporation shall extend."

SECTION 2. "That the Board of Trustees of Clemson College and their successors in office shall have perpetual control and direct the affairs of said corporation." But Section 5 enacts "That nothing herein shall give said Board of Trustees the right to levy or collect any tax."

There are no stock subscriptions issued to any one; no returns are made, and no taxes paid on any property of the College. No money is expended by the Board of Trustees except as directed by the Legislature, to whom they make annual report.

The State of South Carolina now owns the Fort Hill plantation in fee, holds the legal title in trust, and is using said place according to the terms of the trust.

Under these facts, and the record herein, is this action a suit against the State, or has the State consented to the suit?

It is now well settled that it is not necessary that the State should be a part upon the record to determine this question; but that a suit, though not in form, is in effect, an action against the State, where the action as brought against the property of the State; where the State has such an interest in the subject of the suit as to make it a necessary party, or where the property of the State would
122 have to respond to any judgment which might be obtained in the action.

This action is brought against "The Clemson Agricultural College of South Carolina, a corporation created by and existing under the laws of the State of South Carolina." To ascertain the nature, powers and duties of this corporation we must examine the charter and the laws relating thereto.

The State owns the property of the College, and pays the current expenses from the income of the donation of Mr. Clemson, now held and owned by the State, and appropriations from and by the Legislature. Much law may be cited as to what constitutes a private and what a public corporation, but that is not the real question here. Is "The Board of Trustees" of "The Clemson Agricultural College of South Carolina" an agent of the State, and acting as agent of the State? I think that it is, for the State holds the fee in the 814 acres, contained in the Fort Hill place, and has founded and is maintaining "The Clemson Agricultural College of South Carolina" by and

through "The Board of Trustees," as its agents, in accordance with the terms of the trust, created in the Will of Mr. Clemson, and specifically accepted by the State.

This action is not brought against the Trustees as individuals, but against the corporation created under the name of "The Clemson Agricultural College of South Carolina," which is an agent of the State, and as such, at the expense of the State, constructed the dike in question, upon lands of the State.

Has the State consented to a suit of this character being brought against it? In Lowry *vs.* Thompson, 25 S. C., 416, it is held that a State cannot be sued without its consent, except in the limited class of cases in which a State may be sued in the original jurisdiction expressly granted to the Supreme Court by the Con-
123 stitution of the United States. The consent of the State must be expressly and unequivocally given by the Legislature of the State, for the State is a sovereign, and anything not expressly given is withheld. No such consent has been given by the State.

The Plaintiff alleges that the State has, in the charter of the Defendant, expressly empowered the Defendant "to sue and be sued."

The "sue and be sued" provision in the charter of Defendant, relates to such powers as were conferred upon the Trustees by the Act, and the Legislature did not throw the State open to any and all kinds of suits. Under the charter the Trustees could sue and be sued only so far and no further than was necessary to carry out the powers conferred upon the Board, and upon such contracts and obligations as they might make in pursuance of such power. Such permission does not warrant a suit of this nature. This suit is for a tort, and in effect, but not in form, against the State, and is not warranted by any statute. Lowry *vs.* Thompson, 25 S. C., p. 416; 26th A. & E. Encyc. of Law, p. 487 and p. 480; Belknap *vs.* Schild, 161 U. S., p. 10.

This being an action for a tort, against the State, to recover eight thousand dollars, cannot be maintained.

The suit is also for injunction and restoration of former conditions, which are equitable demands to be determined on the Equity side of the Court. "The Court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving these rights; but when a complete determination of the controversy cannot be had, without the presence of other parties the Court must cause them to be brought in." Sec. 143, Code of Laws, 1902.

There can be no complete determination of the controversy at bar without the presence of the State, because a complete
124 determination, should the Plaintiff prevail, would result in an injunction against the use of the dike, and its removal, and a restoration of former conditions. The dike is the property of the State. It benefits and protects the State's lands from the overflow of the waters of Seneca River. It enables the State to better devote the land to the purpose of its donation. It is evident that the Court should not perpetually enjoin the use of the State's property, by its agents, and the destruction of the State's property, by destroying the dike, an improvement on the State's lands, made by agents of the State in carrying out the purpose and trust for which the land

was donated to the State, without the presence of the State, as a party.

The Court cannot order the State to be brought into this action, because it has no authority to make the State a party to any action in its own Court, without its consent. Therefore, for this reason, if no other, this suit must be dismissed.

Columbia W. P. Co. *vs.* Columbia Electric Co., 43 S. C., 154.
Belknap *vs.* Schild, 161 U. S., p. 10.
Lowry *vs.* Thompson, 25 S. C., 410.

It is also evident that all of the property held by the Board of Trustees, as the agent of the State, is property of the State. Much of said property is in the custody of the State Treasurer, held by him as such, and he only pays the income therefrom, as well as the legislative appropriation, to the Board of Trustees, for specific purposes. Therefore the property of the State must respond to any judgment for damages which could be given in this action, because the Board has no other property out of which the judgment might be satisfied.

For every wrong there is a remedy, and it is most gratifying to know that the wrong, alleged by Plaintiff, has its appropriate remedy. The State in its sovereignty has not consented to
125 be a party to this suit, but the Plaintiff can go before the the Legislature, which represents the State, and petition the State to consider the wrongs alleged in the complaint herein, and his alleged rights; and, in the language of Chief Justice McIver, "where, if his claim be well founded, it is not permissible to doubt that he would receive ample justice."

Wherefore it is ordered, adjudged and decreed, that the complaint herein be, and hereby is, dismissed, with costs, in favor of the Defendant.

JAMES ALDRICH,
Presiding Judge.

April 25th, 1906.

Within due time notice of appeal was given by Plaintiff.

The exceptions and grounds of appeal are as follows:

Exceptions and Grounds of Appeal.

To Messrs. Simpson & Hood, Bellinger & Welch and J. P. Carey, Defendant's Attorneys:

Please take notice that Plaintiff appeals to the Supreme Court from the Decree and Judgment rendered by His Honor James Aldrich, Presiding Judge, on April 25th, 1906, in the above entitled action, on the following grounds:

I. Because His Honor erred in finding and holding that the corporation created under the name of "The Clemson Agricultural College of South Carolina" is an agent of the State, and, as such, it cannot be sued; whereas he should have found and held that Defendant is a body politic and corporate, and capable of suing and being sued.

II. Because His Honor erred in finding and holding that the Legislature of the State, in creating the defendant corporation with

the usual powers and liabilities of a corporation, has not thereby given consent for said corporation to be sued.

III. Because His Honor erred in finding and holding that
126 under the charter the Trustees could sue and be sued only so far, and no farther, than was necessary to carry out the powers conferred upon the Board, and upon such contracts and obligations as they might make in pursuance of such power, and such permission does not warrant a suit of this nature.

IV. Because His Honor erred in finding and holding as follows: "This being an action for a tort, against the State, to recover eight thousand dollars, can not be maintained"; whereas, he should have found and held that this is an action against an artificial person, known and designated by the corporate name of "The Clemson Agricultural College of South Carolina," and capable of suing and being sued, in like manner as a natural person, for its unlawful act, either in its own right, or as agent of the State.

V. Because His Honor erred in finding and holding that the property of the corporation is held by the Board of Trustees, as the agent of the State, and that said property is the property of the State; whereas, he should have found and held that said property is not the property of the State in its own right to be used for any political or governmental purpose; but the same is held, used and managed by the Board of Trustees for corporate purposes, to-wit: The founding and maintaining an institution of learning for which said donations and appropriations were made.

VI. Because, under the terms of the devise and bequest of Thomas G. Clemson and the Act of the General Assembly accepting said donation, and incorporating the College, a contract was entered into by and between testator and the State of South Carolina, whereby the entire corpus of the donation became a fund for the perpetual endowment of the institution, a private eleemosynary corporation was created, the contract became irrevokable, the Trustees
127 exercise a special authority created by the will of testator and confirmed by the act of incorporation, and His Honor erred in not so holding.

VII. Because the use, income, rents and profits of the Fort Hill lands are enjoyed by the corporation, without accounting therefor, and while the technical title may be in the State, which is a mere trustee, the Defendant is the *cestui que trust*, the equitable owner thereof, and uses the rents, income and profits of said lands as its property, and His Honor erred in not so holding.

VIII. Because the corporation, known and designated as "The Clemson Agricultural College of South Carolina," has no political or governmental powers, and cannot in a legal sense be considered an agent or officer of the State, and His Honor erred in not so finding and holding.

IX. Because the lands devised by testator, having been devoted by the terms of the devise to educational purposes; by the terms of the devise are held in trust for the use of the institution forever; the same is not property of the State; the Legislature cannot recall or revoke the devise or make any different disposition of the lands, nor sell the property and turn the funds into the State Treasury as the money or property of the State, and His Honor erred in not so holding.

X. Because the 288 acres adjoining the Fort Hill place, conveyed by Floride Isabella Lee on May 25, 1894, to "The Clemson Agricultural College of South Carolina," is owned in fee and possessed by said corporation, and His Honor erred in not so finding and holding.

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XI. Because the tract of 1[30]* acres conveyed to "The Clemson Agricultural College of South Carolina" by Anna P. Lewis on the 30th day of June, 1903, is owned in fee and possessed by the said corporation, and His Honor erred in not so finding and holding.

XII. Because the said corporation may purchase and hold
128 property and may take any property or money given or conveyed by deed, devise or bequest and hold the same for the use and benefit of said College, and His Honor erred in not so finding and holding.

XIII. Because the rents, issues and profits of all lands donated to or purchased for the benefit of said College, are used by the corporation as corporate property, without accounting therefor, and His Honor erred in not so finding and holding.

XIV. Because the will of testator and the charter by the State embody the terms of a binding contract between the parties, and the donations made by the testator as well as the appropriations made from time to time by the State, or Federal Governments, and expended in permanent improvements upon the real estate for the use of said College, are protected from any transfer, sale or disposition thereof by the State, in the slightest degree, contrary to or violative of the terms of the contract, or trust, and His Honor erred in not so finding and holding.

XV. Because the ordinary powers of a corporation are as follows: (1) Perpetual succession; (2) To sue and be sued, and to receive and grant, by their corporate name; (3) To purchase and hold lands and chattels; (4) To have a common seal; (5) To make by-laws. While these powers are generally expressly given by statute, still they are the usual inherent incidents of a corporation, and His Honor erred in not so holding.

XVI. Because the creation by the Legislature of a body corporate impliedly confers upon it the power to sue and be sued so far as may be necessary to maintain its legal rights and to enforce its legal duties, or liabilities. In general it may be said that the power to sue and be sued is, by the principles of the common law, an incident of every corporation, and His Honor erred in not so holding.

129 XVII. Because the ordinary legal remedies applicable in the case of natural persons are equally applicable in case of corporations, and His Honor erred in not so holding.

XVIII. Although an action cannot be brought against a sovereign State without its consent, yet if it chooses so far to cast off its sovereignty as to become a corporator, in that character it may be sued, and His Honor erred in not so holding.

XIX. Where the law imposes an obligation upon a corporation, as well as upon a natural person, which it fails or refuses to recognize or discharge, it may be held civilly liable therefor, at law or in equity, in any appropriate form of action, and His Honor erred in not so holding.

[* Figures enclosed in brackets erased in copy.]

XX. A corporation can commit trespass upon either person or property, through its agents acting in its behalf, and it follows that an action will lie for such injury with the like remedies as in the case of a natural person, and His Honor erred in not so holding.

XXI. Corporations may be held liable, in appropriate states of facts, for torts, commended or authorized by them, and His Honor erred in not so holding.

XXII. Because the dike in question was erected and has been and is being maintained by the defendant corporation by and through the Board of Trustees acting in its behalf, and His Honor erred in not so finding and holding.

XXIII. When the State becomes a corporator it is regarded as an individual, in relation to the corporation. What an individual corporator may do the State, as a corporator, may do, and no more, and His Honor erred in not so holding.

XXIV. A private eleemosynary corporation can enjoy no privilege, immunity or exemption by reason of its connection with the State, other than a corporation composed of private citizens,
130 and His Honor erred in not so holding.

XXV. The State, in its sovereign capacity, is distinct and separate from a corporation. When it establishes a corporation, with the usual corporate powers, for any purpose, be it educational, benevolent, charitable, industrial, financial or governmental, it does not invest the corporation with any of its sovereign power or immunity, and His Honor erred in not so holding.

XXVI. Because the various Acts of the General Assembly conferring corporate powers upon "The Clemson Agricultural College of South Carolina," create three different types of corporations, to-wit: (*a*) a private eleemosynary corporation for educational purposes, by Act approved November 27, 1889; (*b*) a municipal corporation, by Act approved December 24, 1894; (*c*) a railroad corporation, subject to all liabilities of railroad corporations, by Act approved February 19, 1900; and His Honor erred in not so finding and holding.

XXVII. Because the several acts of the Legislature conferring corporate powers upon "The Clemson Agricultural College of South Carolina" clothe said corporation with the usual powers, responsibilities and liabilities incident to such corporations, and in the face of these statutes it was error for His Honor to hold as follows: "The 'sue and be sued' provision in the charter of Defendant relates to such powers as were conferred upon the Trustees by the Act, and the Legislature did not throw the State open to any and all kind- of suits. Under the charter the Trustees could sue and be sued only so far and no farther, than was necessary to carry out the powers conferred upon the Board, and upon such contracts and obligations as they might make in pursuance to such power."

XXVIII. Because the defendant corporation, acting by and through its Board of Trustees, erected and maintained the
131 dike in question, and if injury and damage ensue therefrom to the lands of Plaintiff, an action therefor will lie against the corporation in like manner as against a natural person, and His Honor erred in not so finding and holding.

XXIX. Because the injurious acts alleged in the complaint are the acts of the defendant corporation, acting by and through the

Board of Trustees as its agent, and not by the Trustees individually, singly or collectively; and, when action is brought against the corporation for such injury and damage, it is incumbent upon the corporation to defend and justify such act, if it can, in like manner as a natural person must do; and, unless a natural person acting as the defendant corporation is alleged to have acted, could defend and justify by invoking some constitutional right or statute, the issue joined must be heard and determined by the Court, and His Honor erred in not so finding and holding.

XXX. A defendant, whether natural or corporate, sued as a wrong-doer, who seeks to substitute the State in his or its place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his or its act and exonerated him or it, cannot rest on the bare assertion of such defense. It is necessary for such a defendant, in order to complete his defense, to produce a valid law of the State as a warrant of his or its act, and His Honor erred in not so holding.

XXXI. Because Article III, Section 17, of the State Constitution of 1895, provides: "Every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title;" the Joint Resolution approved January 14, 1894, which it is claimed authorizes the diking of Seneca River, is entitled as follows: "A Joint Resolution to authorize and require the Directors of the Penitentiary to furnish to the Trustees of Tho Clemson Agri-
132 cultural College fifty convicts, and to furnish to the Regents of the Lunatic Asylum fifty convicts, and to furnish to the Trustees of the South Carolina Industrial and Winthrop Normal College one hundred convicts;" and so much of said joint resolution as relates to the diking of Seneca River by said Trustees with the work of said convicts violates this provision, and is unconstitutional, null and void; it cannot be invoked as a Legislative Act, or declaration, authorizing or directing the diking of Seneca River by the said Board of Trustees, whether acting as agents of the State, or as agents of the corporation, and His Honor erred in not so finding and holding.

XXXII. Because Article I, Section 5, of the State Constitution of 1895 guarantees that no person shall be deprived of his property without due process of law. A person may be deprived of his property without any physical taking thereof, and this provision of the Constitution is violated by any Act which destroys the value of property, takes away any of its essential attributes, or deprives the owner of the lawful use of it; and, a properly entitled Act or resolution of the General Assembly, authorizing or directing a course of action, which results in any such depriving of the owner of his property, would be unconstitutional, null and void, and could furnish no defense in law or equity; and His Honor erred in not so holding.

XXXIII. Because the Fourteenth Amendment to the Constitution of the United States provides: "Nor shall any State deprive any person of life, liberty or property without due process of law." The allegations of the complaint show that Plaintiff has been deprived of his property for all practical purposes as agricultural lands as

effectually as if there had been a physical taking thereof; that Plaintiff has thus been deprived of his property by the defendant corporation, acting by and through its Board of Trustees, and
133 this constitutional guarantee has been violated by such action, whether taken pursuant to an Act of the Legislature or otherwise, and His Honor erred in not so holding.

XXXIV. Because the objection that this is an action against the State is inconsistent with the principle involved in Article 5 of the Amendments to the Constitution of the United States, providing, "That no person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation;" and His Honor erred in not so holding.

XXXV. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. Whatever wrong may be attempted in the name of the State is imputable to its agency, the government, and not to the State; for as it can speak and act only by law, whatever it does say or do must be lawful. That which, therefore, is unlawful, because made so by the supreme law, the Constitution of the United States, is not a word or deed of the State, but is the mere wrong and trespass of those persons, whether natural or artificial, who falsely speak and act in its name. The principles of individual liberty and right of property cannot be maintained if, when violated, the judicial tribunals are forbidden jurisdiction in actions brought against the offenders, whether natural or artificial, who are the instruments of wrong, because they interpose the shield of the State, and his Honor erred in not so holding.

XXXVI. The objection is that, as the State cannot be brought before the Court, this suit cannot be sustained against the defendant corporation, the alleged agent of the State; whereas, even if the defendant corporation be the agent of the State, and the State
134 be exempt from judicial process, it would still be subversive of the best established principles to say that the law cannot afford the same remedies against the agent employed in doing the wrong, which it would afford against him could his principal be joined in the suit; and His Honor erred in not so holding.

XXXVII. An action against a corporation cannot be regarded or treated as an action against the corporator or party owning its stock or property. When an artificial person, called a corporation, is brought into existence, it, like all other persons, natural as well as artificial, may be subjected to the process of the Courts, and the fact that its property is owned in part or in whole by the State, confers upon it no exemption from suit, as the corporation and the person or persons, whether natural or artificial, who compose it, are totally distinct and different; and His Honor erred in not so holding.

XXXVIII. Because the moneys appropriated from time to time by the General Assembly are for the use of the corporation and devoted as a trust or corporate fund to the carrying out of its business as an educational institution under the direction and control of the

Board of Trustees, as a corporate body; and for any act of said Board in the performance of its duty resulting in unlawful injury to the rights of person or property of another, such fund would be answerable to and could be reached by the ordinary process of the Courts in actions brought for redress of such wrongs, and His Honor erred in not so holding.

XXXIX. It does not follow, that, because the State makes annual appropriations to assist the defendant corporation in maintaining an institution of learning in accordance with the will of Thomas G. Clemson, and to make certain that its bounty shall not be misapplied, requires annual reports to the General Assembly by the Board of Trustees, showing receipts and disbursements, said corporation is exempt from suit, and His Honor erred in not so holding.

XL. To grant the relief prayed for in the complaint would not have the effect of clogging the wheels of one of the branches of the State government, nor interfere with the State in the discharge of any of its political or governmental functions. The State is not an indispensable party to the issue raised; in no way can it be affected by the determination of either the legal or equitable cause of action set out in the complaint, and His Honor erred in not so holding.

XLI. Because His Honor erred in finding and holding as follows: "There can be no complete determination of the controversy at bar without the presence of the State; because a complete determination, should the Plaintiff prevail, would result in an injunction against the use of the dike, and its removal, and a restoration of former conditions;" whereas, he should have found and held that there can be a complete determination of the controversy without the presence of the State; that such order of injunction, if issued, would require the corporation acting by and through its Board of Trustees, who erected the dike, to remove the same and restore the condition as they found it prevailing at the time of their unlawful act of constructing the same.

XLII. Because His Honor erred in finding and holding that said dike is the property of the State; whereas, he should have found and held that the dike is the property of defendant corporation.

XLIII. Because it was error for His Honor to find and hold as follows: "It is also evident, that all property held by the Board of Trustees, as the agent of the State, is the property of the State;" whereas, he should have found and held that the property held by said Board of Trustees, except such personal property as has been purchased by them with moneys appropriated by the State, is the property of the defendant corporation; that the State is a mere trustee, holding said property for the use of the corporation.

XLIV. Because it was error for His Honor to find and hold that the property of the State must respond to any judgment for damages which could be given in this action; because the Board has no other property out of which the judgment might be satisfied; whereas, he should have found and held that there is property of the corporation far in excess of the amount of any judgment for damages which could be rendered in this action.

XLV. Because it was error for His Honor to find and hold that the State in its sovereignty has not consented to be a party to this suit; whereas, he should have found and held that the State, by creating said corporation and clothing it with the usual corporate powers, and liabilities, and expressly declaring that it may sue and be sued, has thereby granted and given all necessary and requisite consent that suit may be brought, without a grant of further consent.

XLVI. Because a suit against an officer or agent of a State to enjoin the enforcing of an unconstitutional statute whereby the Plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, is not an action against the State, and His Honor erred in not so holding.

XLVII. Because, if a State by its officers or agents should seize for public use, or for the use of the State, the property of a citizen, without making or securing just compensation to him, and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law, the citizen would be remediless so long as the State, by its agents, chooses to hold his property, and His Honor erred in not so holding.

XLVIII. While it is true that even in case of seizure, in-
137 jury or damage to the property of the citizen by an officer or agent of the State, the citizens may, if he choose, rely upon the good faith of the State in the matter of compensation; still he is not compelled to part with his property, even for the use or benefit of the State, or sustain injury thereto, except upon the terms prescribed by the supreme law of the land, namely, upon just compensation made or secured, and His Honor erred in not so holding.

XLIX. An action, whether brought to recover money or property in the hands of an officer or agent of a State, unlawfully taken by him in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong or injury, is not, within the meaning of the Constitution, an action against the State, and His Honor erred in not so holding.

L. That Article I, Section 17, of the State Constitution of 1895 provides: "Private property shall not be taken for private use without consent of the owner, nor for public use without just compensation being made therefor;" that this provision of the Constitution has been violated by the act of the defendant corporation without consent of Plaintiff and without just compensation having been made to Plaintiff by Defendant, and His Honor erred in not so holding.

LI. Because, even if the defendant corporation be considered in a legal sense an agency of the State, still the action of Defendant in erecting and maintaining the dike has thereby created a continuing nuisance resulting in injury and damage to lands of Plaintiff, for which an action will lie against Defendant for such unlawful and injurious act, even though action will not lie against the State for the unlawful act of the agent, and His Honor erred in not so holding.

138 LII. Because the State will not suffer one of its citizens to be injured in his property, or deprived thereof, by an unlawful act of an agent, who in such transaction becomes a false representative of the principal, and, therefore, while the State cannot be sued, still it cannot countenance wrong, and, for this reason, the citizen is permitted to sue the agent of the State for the commission of an unlawful, or unconstitutional act, resulting in damage and injury to property, or the depriving thereof, and His Honor erred in not so holding.

LIII. Because His Honor confused the right of action against Defendant with the remedy, or the want of a remedy, for the enforcement of a judgment for damages, should Plaintiff succeed in recovery of such judgment; whereas, it matters not whether the defendant corporation has or has not any property out of which a money judgment might be enforced by levy and sale under execution, the question as to the enforcement of a judgment being no part of Plaintiff's cause of action, and His Honor erred in not so holding.

LIV. Because the allegations of the complaint show the creation of a nuisance by the defendant corporation, whether acting for itself in its own right, or as an agent of the State, and that said nuisance has been and remains a continuous one, resulting in continuous and increasing damage and injury to the property of Plaintiff, a proper case is thereby shown for the invoking of equitable relief by the removal of said dike, and preventing the continuance of said nuisance by the abatement thereof, and His Honor erred in not so holding.

LV. Because, even if the State be the owner in fee and in possession of all the property, real and personal, devised and bequeathed by Thomas G. Clemson, still said property cannot be used by any officer, agent, or agency of the State, in such a manner as to inflict damage and injury upon the property of a citizen, whereby the value
139 of such property is depreciated, the use thereof impaired, or the owner deprived of his property without just compensation; and in such case action will lie against the officer, agent, or corporate agency of the State through whose act the damage and injury be inflicted, for redress of such wrong, and His Honor erred in not so holding.

LVI. If officers or agents of the State invade the private right of property in a mode not authorized by statute, or if such statute be invalid, the person injured has a preventive remedy by injunction, although the State may be affected thereby, yet not a party of the action, and His Honor erred in not so holding.

R. T. JAYNES,
Attorney for Plaintiff, Appellant.

Financial Statement of P. H. E. Sloan, Secretary and Treasurer Clemson Agricultural College of South Carolina, for Year Ending June 30, 1901.

To balance on hand July 1, 1900		$17,122 46
Cash received from Clemson Bequest		3,512 36
Cash received from interest on deposits		2,409 95
Cash received from Land Scrip Fund		5,754 00
Cash received from Inspection Tax		100,794 89
Cash received from tuition fees		2,550 00
Cash received from sale of dairy products		2,675 42
Cash received from Electric Plant		544 69
Cash received from rents		280 00
Cash received from Textile Department		256 89
Cash received from all other sources		439 96
		$136,340 72
Less expenses of Fertilizer Department in collecting tax and analyzing fertilizers		10,829 88
Amount to be expended by the College		$125,510 84
Total amount paid out		101,334 88
Balance on hand July 1, 1901		$24,175 96
Agricultural Department—By amount paid:		
For Class Cottage and grounds	$750 01	
140 For Botany	749 36	
For Dairy	2,956 54	
For Farm	2,051 92	
For Veterinary	368 91	
For Entomology	459 55	
For Horticulture	171 73	
For Labor	284 46	
For Freight and Express	25	
For Construction and Repair	497 41	
For Teams and Teamsters	114 75	
		$8,404 89
Chemical Department:		
For Apparatus and Supplies	647 03	
For Geology	248 80	
For Books	25 19	
For Mineralogy	54 53	
For Chem. New Building	11,507 55	
For Freight and Express	41 07	
For Labor	7 71	
For Postage and Stationery	2 00	
For Construction and Repair	56 63	
For Unclassified	2 70	
		12,593 21

Mechanical Department:		
For Mechanical Laboratory	624 63	
For Wood Shop	1,208 56	
For Drawing Division	336 25	
For Machine Shop	2,087 99	
For Forge and Foundry	1,721 46	
For Electric Division	2,731 24	
For Physics	408 83	
For Construction and Repairs	1,088 91	
For Office	28 75	
For Janitor	265 83	
For Elect. New Building	10 20	
For Unclassified	206 31	
For Supplies	402 71	
		11,121 67
Miscellaneous Department:		
For Salaries	25,055 31	
For Labor	1,279 53	
For Library	1,009 57	
For Office	728 62	
For Travel	1,358 68	
For Water	1,972 85	
For Construction and Repairs	2,376 74	
For Printing	663 78	
For Chapel	1,259 72	
For Heat	210 33	
141 For Catalogues and Advertising	745 61	
For Power and Lights	7,219 19	
For Insurance	569 60	
For Campus and Bridges	915 28	
For Lectures	405 30	
For Convicts	1,771 11	
For Unclassified	127 95	
For Mathematics	135 05	
For Telephones	149 63	
For Exhibit	658 11	
For Furniture	117 00	
For Railroad	329 47	
For Equipment	125 63	
For English	11 10	
For Dike	86 90	
For Entomol. Board	35 94	
For New Barracks	3,969 23	
For Cottages	18 00	
		53,305 23
Military Department:		
For Salaries	1,200 00	
For Construction and Repairs	1 00	
For Office	14 35	
For Equipment	24 90	
		1,240 25

Textile Department:

For Coal	37 50	
For Fixtures	242 46	
For Equipment	2,581 32	
For Freight and Express	470 34	
For Labor	660 93	
For Supplies	1,441 17	
For Machinery	1,434 10	
For Expenses	30 46	
For Postage and Stationery	22 00	
For Textile New Building	6,981 81	
For Construction and Repairs	18 97	
For Unclassified	16 07	
For Dye House and Supplies	732 50	
		14,669 63
Total Expenditures		$101,334 88

July 1, 1901.

We, the Finance Committee of Clemson Agricultural College, have examined the Financial Statement of Dr. P. H. E. Sloan, Secretary and Treasurer, and find it correct.

(Signed) R. W. SIMPSON,
(Signed) M. L. DONALDSON.

July 18, 1901.

142 *Agreements.*

THE STATE OF SOUTH CAROLINA,
County of Oconee:

In Court of Common Pleas.

DR. JOHN HOPKINS, Plaintiff,
against
THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA,
Defendant.

It is hereby agreed that the jurisdictional issue raised by the Defendant shall be first determined, and that either party may offer such testimony on this isue as they may desire before the Circuit Judge, who shall decide said issue, from whose decision either party may appeal to the Supreme Court, and the other features of the case are not to be heard until this issue is finally disposed of.

R. T. JAYNES,
Plaintiff's Attorney.
SIMPSON & HOOD,
BELLINGER & WELCH,
JAMES P. CAREY,
Defendant's Attorneys.

March 8th, 1906.

It is hereby agreed that the financial report of P. H. E. Sloan, Secretary and Treasurer of Clemson Agricultural College of South Carolina, for year ending June 30, 1901, be printed as part of "Case" for Supreme Court, and that the financial reports for the other years show receipts of funds for the use of the College, principally from the Clemson bequest, the Land Script Fund, the Inspection Tax, tuition fees and dairy products. The farm products are used for the maintenance of the College.

It is hereby agreed that the foregoing printed pages shall constitute the "Case" for the Supreme Court, and that a copy thereof may be filed with the Clerk of the Supreme Court as the return required by the rule. It is further agreed that either party has the
143 privilege of correcting any mistake or error that may be found on a careful reading or examination of the foregoing printed pages. If any testimony introduced on the hearing before the Circuit Court be found to have been omitted, same to be supplied at the option of either party.

R. T. JAYNES,
Attorney for Plaintiff, Appellant.
SIMPSON & HOOD,
BELLINGER & WELCH,
JAMES P. CAREY,
Defendants' Attorneys.

May 10, 1906.

STATE OF SOUTH CAROLINA:

In the Supreme Court.

I, U. R. Brooks, clerk of the Supreme Court of South Carolina, do hereby certify that the foregoing is a true copy of the "agreed case" on file in this office in the case of Dr. John Hopkins, plaintiff, *versus* The Clemson Agricultural College of South Carolina, defendant.

Witness my hand and the seal of the Supreme Court this 18th day of July A. D. 1908.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

144 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Tenth Circuit, Oconee County, April Term, 1906.

DR. JOHN HOPKINS, Plaintiff-Appellant,

against

THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, a Corporation Created by and Existing under the Laws of the State of South Carolina, Defendant-Respondent.

Opinion by Y. J. Pope, C. J.

This action was begun on the first day of September, 1905.

Its object was to recover by the plaintiff of the defendant the sum of eight thousand dollars on account of the tort of the defendant by a dyke erected by the defendant on the east side of the Seneca River which was alleged had caused the waters of said Seneca River to overflow forty three acres of bottom lands owned by the plaintiff so that said lands were so injured and damaged by the said dyke on defendant land on the East side of Seneca River that plaintiff's bottom land became practicaly ruined and useless to the damage of plaintiff in the sum of eight thousand dollars. Also that the plaintiff seeks an injunction against the defendant whereby said dike shall be removed.

The defendant by its answer denied all the allegations of the plaintiff's complaint, but insisted that the land upon which the dyke was erected was and is still held by the State of South Carolina as the owner in fee simple thereof and the same is now and has been since 1890 in the possession of said State of South Carolina, and that the defendant, The Clemson Agricultural College of S. C., has had and still has the management of the said property belonging to the said State of S. C., but the defendant has no title or interest
145 in said land. And that the dyke in question in 1894 was built by the State of South Carolina upon its own property, and that the defendant simply acted as the agent of said State in the direction and maintenance of said dyke which was fully authorized by the State.

When this action was called for trial, a consent in writing signed by the attorneys on each side, was made by which it was agreed that the jurisdictional issue raised by the defendant shall be first determined, and that either party may offer such testimony on this issue as they may desire. Judge James Aldrich heard the issue thus presented, and after argument rendered the following decree dated 25th April, 1906: "Plaintiff in his complaint alleges that he is the owner in fee and in possession of a very valuable tract of bottom land on the West side of Seneca River, in the County of Oconee; that about the years 1894-1895, the Defendant, by its Board of Trustees, constructed on its land lying on the east side of Seneca River, and opposite the bottom lands of plaintiff, a high and strong

embankment or dyke, for the purpose of preventing the overflow of the waters of Seneca River on its bottom lands in the times of freshet or floods; that said embankment prevents entirely the accustomed overflow of said water upon the bottom lands of Defendant, and in times of freshet the entire volume of said water is thrown upon, and forced to flow with great volume and momentum upon Plaintiff's bottom land aforesaid, whereby Plaintiff's natural bank on Plaintiff's side, and the rich soil of his bottom lands were washed away; that said bottom lands of Plaintiff have been practically ruined and rendered sterile, to Plaintiff's damage in the sum of eight thousand dollars.

Wherefore, Plaintiff asks judgment against Defendant (1) for $8,000 and costs, (2) that Defendant be enjoined by the proper order of this Court to abate and remove *by the proper order of this Court to abate and remove* said dyke, and restore the condi-
146 tions prevailing and existing prior to the construction of said dyke; (3) and for such other and further relief as to the Court may seem proper.

The defendant answered the complaint, alleging that the farm and land on the east side of Seneca River, described in the complaint, was the property of the State of South Carolina; that all action done with reference to the erecting and maintaining said dyke were done by the State through its agents and employees, duly authorized by the State, and that the Court has no jurisdiction in this action.

Counsel for Plaintiff and Defendant entered into a written agreement, by the terms of which it is provided that the jurisdictional issues raised by the Defendant shall be first determined, and then the other issues in the case shall be tried, unless those issues are finally disposed of herein.

At the winter term of this Court the case came up for trial under said agreement, and both sides offered testimony relating to the jurisdictional issue, which will be found in the record herein.

The complaint alleges two causes of action, one for injunction, etc., on the equity side of the Court, and the other for damages on account of alleged injuries to lands of Plaintiff, by reason of a tort committed thereon by the Defendant. Water Power Co. *vs.* Electric Co., 43 S. C., 155.

By the will of Honorable Thomas G. Clemson, duly probated in the County of Oconee on the 20th day of April, 1888, he devised and bequeathed the Fort Hill place, consisting of 814 acres (the land upon which the dyke involved in this action was constructed) and other property, real and personal, to his executor, "in trust that whenever the State of South Carolina may accept such donation from me for the purpose of thereupon founding an agricultural College, in accordance with the views I have hereinbefore expressed * * * then my executor shall then execute a deed of
147 the said property to the said State, and turn over to the same all property hereinafter given as an endowment of said institution, to be held as such by the said State so long as it in good faith devotes said property to the purpose of the donation."

Item 2. "The following named gentlemen, seven in number,

shall be seven of the Board of Trustees, to-wit: R. W. Simpson, D. K. Norris, M. L. Donalson, R. E. Bowen, B. R. Tillman, J. E. Wannamaker and J. E. Bradley; and the State, if it accepts the donation, shall never increase the Board of trustees to a number greater than thirteen in all, nor shall the duties of said Board be taken away or conferred upon any other men or body of men. The seven trustees appointed by me shall always have the right, and the power is hereby given them and their successors, which right the Legislature shall never take away or abridge, to fill all vacancies which may occur in their number by death, resignation, refusal to act, or otherwise. But the legislature may provide as it sees proper for the appointment or election of the other six trustees, if it accepts the donation. * * * The name of this institution is to be "The Clemson Agricultural College of South Carolina."

In the preamble to his will testator says: "I have determined to devote the bulk of my property to the establishment of an Agricultural College upon the Fort Hill place. This institution I desire to be under the control and management of a Board of Trustees, a part of whom are hereinafter appointed, and to be modeled after the agricultural College of Mississippi as far as practicable," * * * "But I desire to state plainly that I wish the trustees of said institution to have full authority and power to regulate all matters pertaining to said institution, to fix the course of studies, to make rules and regulations for the same, and to change them as in their judgment and experience may prove necessary." * * *

148 By an act of the General Assembly, approved November 27th, 1889, the State of South Carolina declares that it accepts the devise and bequest of Hon. Thomas G. Clemson, subject to the terms and conditions set forth in his said will, "and that the Treasurer of the State be, and he is hereby, authorized and empowered to receive and securely hold the said property, both real and personal, and to execute all necessary papers and receipts thereafter, as soon as the executor shall convey and transfer the said devise and bequest to the said State." An Agricultural and Mechanical College of South Carolina." "To be situated at Fort Hill, in Oconee County, on the plantation so devised." It is further provided that said College shall be under the management and control of a Board of thirteen Trustees, composed of the said seven members nominated by said will, and their successors, and six members to be elected by the Legislature; they shall organize the College and put it in operation, prescribe the courses of study, elect the professors, * * * and make all rules and regulations for the government of the college; employ such superintendents, head workmen, laborers for the farm, shops and grounds as may be necessary; charge tuition, etc.

Section 4 of said Act provides "That the said Board of Trustees is hereby declared to be a body politic and corporate, under the name and style of the Clemson Agricultural College of South Carolina. They shall have a corporate seal, which they may change at their discretion and in their corporate name they may contract for, purchase and hold property, for the purposes of this Act, and may take any property and money given or conveyed by the deed, devise or

bequest to said College and hold the same for its use and benefit. * * * The Board may sell any of the personal property 'not subject to trust.' * * * They may sue and be sued, plead and be impleaded, in their corporate name, and may do all things necessary to carry out the provisions of this Act, and may make by-laws for this purpose if they deem it necessary." In Section 6 of
149 said Act this proviso appears: "And provided, further, that all personal property purchased with money appropriated by the State shall be taken and held as property of the State of South Carolina, and it shall be the duty of said Board of Trustees to make to the Legislature an annual report of the College, and of all farming operations and tests and experiments, and of all receipts and expenditures, with a statement of the condition of the property and funds of said College, and of all receipts and expenditures of money appropriated thereto by the State."

Pursuant, to the power and in discharge of the trust vested in him by the will of Mr. Clemson, on March 6th, 1890 the Executor thereof conveyed, in fee simple, the Fort Hill place and all the residue and remainder of the estate of testator (after payment of legacies) unto the State of South Carolina, "subject, however, to all and singularly the uses, trusts, limitations and conditions hereinafter expressed and contained"—that is to say, "In trust for the purpose of founding upon the Fort Hill plantation herein and hereby conveyed and hereinafter more fully described, an Agricultural College in accordance with the views, limitations and conditions set forth in the last will and testament and codicil of the said Thomas G. Clemson, hereinbefore referred to, and all holdings and balance of the said property as an endowment of said institution, under the terms and conditions in the said last will and testament and codicil."

By a joint resolution, approved January 4th, 1894, the Legislature authorized the Board of Trustees to purchase the Lee lands of 228 acres, adjoining the Fort Hill place, for ten thousand dollars and pay for same. On May 25th, 1894, a deed was made for this land by Floride Isabella Lee. Another small tract of fourteen acres, purchased and paid for by the State, was deeded to the College by Mrs. Anna P. Lewis, the price thereof being $420, and the date of the deed is June 30th, 1893.

150 On the 23rd day of December, 1889, the Legislature passed an Act providing for the building and maintenance of Clemson College, and vested one-half of the Land Script and Hatch funds, and what is known as the Morrill fund, in the six Trustees elected by the State, the income for the support of the College. The only other source of income of the College is the fertilizer tax. This tax is paid to the State Treasurer, subject to the order of the Trustees. The Act of December 24th, 1890 so provides, and all monies appropriated to public institutions are paid by the State Treasurer. Sec. 724, Code of Laws of S. C. 1902.

By a joint resolution approved December 23rd, 1890, entitled "A Joint Resolution Providing for the investment of all Funds in the hands of the State Treasurer, under the Clemson Bequest, and Directing him to pay the interest arising thereon to the Board of Trustees of Clemson Agricultural College," the State Treasurer is directed to invest and reinvest the funds now in his hands and such as may come into his hands, derived from the Clemson bequest, in

such manner as he shall be directed by the Governor, the Comptroller General and the Treasurer of the State, or any two of them, and the State Treasurer is to collect the interest on said funds and pay them to the Treasurer of the Board of Trustees.

By a Joint Resolution approved December 22nd, 1891, the State Treasurer is authorized to collect all evidences of indebtedness now held by him and which were turned over to him as a part of the Clemson bequest, and invest the same in Brown Consols bearing interest at the rate of six per cent. per annum.

On December 24th, 1890, the General Assembly approved "An Act to Abolish the Department of Agriculture and the Office of Commissioner of Agriculture, and to devolve all their powers and duties on the Board of Trustees of 'The Clemson Agricul-
151 tural College of South Carolina,' except the control of Phosphate interests of the State."

The Act prescribing the duties of the Board of Trustees, and the last section thereof, enacts "That all the privilege tax on fertilizers, now required to be paid to the Commissioner of Agriculture, shall in the future be paid to the Treasurer of the State, subject to the order of the Board of Trustees of the Clemson Agricultural College of South Carolina, except the control of phosphate interests of the State."

The Act prescribing the duties of the Board of Trustees, and the last Section thereof, enacts "That all the privilege tax on fertilizers, now required to be paid to the Commissioner of Agriculture, shall in the future be paid to the Treasurer of the State, subject to the order of the Board of Trustees of the Clemson Agricultural College of South Carolina * * * for its erection and maintenance."

The dyke in question was built on the eight hundred and fourteen acre tract conveyed, as heretofore stated, by the Executor of Mr. Clemson to the State. By a Joint Resolution, approved January 4, 1894, the Board of Directors of the South Carolina Penitentiary were authorized to furnish convicts to the said Board of Trustees, and providing that fifty convicts be employed by said Trustees in dyking the Seneca River.

A municipal corporation, known as Clemson College, was created by "An Act to incorporate Clemson College for the purpose of police regulation and the abatement of nuisance." Approved December 24th, 1894. "The limits of said corporation * * * is a circle formed with the College building as a centre, with a radius of five miles, thus making the diameter of the circle ten miles, within which boundaries the jurisdiction of the corporation shall extend."

Section 2. "That the Board of Trustees of Clemson College and their successors in office shall have perpetual control and
152 direct the affairs of said corporation." But Section 5 enacts "That nothing herein shall give said Board of Trustees, the right to levy or collect any tax."

There are no stock subscriptions issued to any one; no returns are made, and no taxes paid on any property of the College. No money is expended by the Board of Trustees except as directed by the Legislature, to whom they make annual report.

The State of South Carolina now owns the Fort Hill plantation in

fee, holds the legal title in trust, and is using said place according to the terms trust.

Under these facts, and the record herein, is this action a suit against the State, or has the State consented to the suit?

It is now well settled that it is not necessary that the State should be a party upon the record to determine this question; but that a suit, though not in form, is in effect an action against the State; where the State has such an interest in the subject of the suit as to make it a necessary party, or where the property of the State would have to responded to any judgment which might be obtained in the action.

This action is brought against "The Clemson Agricultural College of South Carolina, a corporation created by and existing under the laws of the State of South Carolina." To ascertain the nature, power and duties of this corporation we must examine the charter and the laws relating thereto.

The State owns the property of the College, and pays the current expenses from the income of the donation of Mr. Clemson, now held and owned by the State, and appropriations from and by the Legislature. Much law may be cited as to what constitutes a private and what a public corporation, but that is not the real question here. Is
"The Board of Trustees" of Clemson Agricultural College of
153 South Carolina" an agent of the State, and acting as agent of the State? I think that it is, for the State holds the fee in the 814 acres, contained in the Fort Hill place, and has founded and is maintaining "The Clemson Agricultural College of South Carolina" by and through "The Board of Trustees," as its agents, in accordance with the terms of the trust, created in the Will of Mr. Clemson, and specifically accepted by the State.

This action is not brought against the trustees as individuals, but against the corporation created under the name of "The Clemson Agricultural College of South Carolina," which is an agent of the State, and as such, at the expense of the State, constructed the dike in question, upon lands of the State.

Has the State consented to a suit of this character being brought against it? In Lowry *vs.* Thompson, 25 S. C., 416, it is held that a State cannot be sued without its consent, except in the limited class of cases in which a State may be sued in the original jurisdiction expressly granted to the Supreme Court by the Constitution of the United States. The consent of the State must be expressly and unequivocally given by the Legislature of the State, for the State is a sovereign and anything not expressly given is withheld. No consent has been given by the State.

The Plaintiff alleges that the State has, in the charter of the Defendant, expressly empowered the Defendant "to sue and be sued."

The "sue and be sued" provision in the Charter of the Defendant, relates to such powers as were conferred upon the Trustees by the Act, and the Legislature did not throw the State open to any and all kinds of suits. Under the charter the Trustees could sue and be sued only so far and no further than was necessary to carry out the powers conferred upon the Board, and upon such contracts and obli-

gations as they might make in pursuance of such power.
154 Such permission does not warrant a suit of this nature. This suit is for a tort, and in effect but not in form against the State, and is not warranted by any statute. Lowry *vs.* Thompson, 25 S. C., 416; 26th A. & E. Ency. of Law, p. 487-480; Belknap *vs.* Schild, 161 U. S., 10.

This being an action for tort, against the State, to recover eight thousand dollars, cannot be maintained.

The suit is also for injunction and restoration of former conditions, which are equitable demands to be determined on the Equity side of the Court. "The Court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving these rights; but when a complete determination of the controversy cannot be had, without the presence of other parties the Court must cause them to be brought in."

Sec. 143, Code of Laws, 1902.

There can be no complete determination of the controversy at bar without the presence of the State, because a complete determination, should the Plaintiff prevail, would result in an injunction against the use of the dyke, and its removal, and a restoration of former conditions. The dyke is the property of the State. It benefits and protects the State's lands from the overflow of the waters of Seneca River. It enables the State to better devote the land to the purpose of its donation. It is evident that the Court should not perpetually enjoin the use of the State's property, by destroying the dike, an improvement on the State's lands, made by the agents of the State in carrying out the purpose and trust for which the land was donated to the State, without the presence of the State as a party.

The Court cannot order the State to be brought into this action, because it has no authority to make the State a party to any action in its own Court, without its consent. Therefore, for this reason, if no other, this suit must be dismissed.

Columbia, W. P. Co., *vs.* Columbia Electric Co., 43 S. C., 154. Belknap *v.* Schild, 16, U. S. 10; Lowry *vs.* Thompson, 25 S. C., 410.

It is also evident that all the property held by the Board of Trustees, as the agent of the State, is the property of the State. Much of said property is in the custody of the State Treasurer, held by him as such, and he only pays the income therefrom, as well as the Legislative appropriation, to the Board of Trustees, for specific purposes. Therefore the property of the State must respond to any judgment for damages which could be given in this action, because the Board has no other property out of which the judgment might be satisfied. For every wrong there is a remedy, and it is most gratifying to know that the wrong alleged by Plaintiff, has its appropriate remedy. The State in its sovereignty has not consented to be a party to this suit, but the Plaintiff can go before the Legislature, which represents the State and petition the State to consider the wrongs alleged in the complaint herein, and his alleged rights; and in the language

of Chief Justice McIver, "where, if his claim be well founded, it is not permissible to doubt that he would receive ample justice."

155 Wherefore it is ordered, adjudged and decreed, that the complaint herein be, and hereby is, dismissed, with costs, in favor of the Defendant."

We are perfectly satisfied with the Circuit decree, and will only add a few observations thereon.

The plaintiff exhibited 46 grounds of appeal therefrom and these grounds of appeal will be reported.

We will confine ourselves to the two questions, viz: (1) Is the action in effect a suit against the State of South Carolina? (2) Is the State an indispensable party to the complete determination of the controversy?

156 (1) We do not see how it can be successfully contended that this suit is not against the State. Before Thomas G. Clemson's death he owned the 814 acres of land known as the Fort Hill plantation. By his last will he directed his executor upon certain conditions, to convey said tract of land unto the State of South Carolina in fee simple. The conditions named in said last will and testament of Thomas G. Clemson have been fully complied with and the deed of conveyance has actually been made, to wit: in 1890, unto the State of South Carolina, and said tract of land is still in full possession of the same as the sole owner thereof. By an Act of her Legislature the Board of Trustees of the Clemson Agricultural College has been made the agent of said State in maintaining and managing the same. In 1894, a dike, on the bank of Seneca River, on its eastern side, was built and constructed, under the authority of the State, by the Clemson Agricultural College. This dike solely on the lands owned by the State, is the cause of this controversy. The suit is brought against the Clemson Agricultural College and, not, in name or fact, against the State of South Carolina. What kind of a corporation is this public or private? It seems to us it is a public corporation. This matter independent of the history of the origin, conduct, and maintenance of the college in question, is set at rest by the case of the State of Kansas *ex rel.*, Little *vs.* Board of Regents of University of Kansas *et al.* 29 L. R. A. 378, and the exhaustive note on this question. We may refer also to Williamson *vs.* Louisville Industrial School of Reform 95 Kentucky, 251: Weddell *vs.* Board of County School Commissioners, 94 Md., 334.

But will the words of the Charter "to sue and be sued" give sanction to the idea that those words operate as a Legislative authorization suit for a tort? This question has been before the Court before and in every case we have held that those words only confer

157 a right to sue such public corporations for the enforcement of a contract, and that it is necessary to have direct and explicit authority to sue such corporations for a tort. Bryant *vs.* City Council of Orangeburg, 70 S. C. 137: White *vs.* City Council of Charleston, 2 Hill, 571, which holds that it is settled in this State that an action to recover damages for a tort, unless it is provided for by Statute, cannot be maintained against a municipal corporation.

Columbia *vs.* Chester 20 S. C., 286; Gibbs *vs.* Town Council of Beaufort 20 S. C., 218.

There is no special statute of this State authorizing a suit against the Clemson Agricultural College of South Carolina for a tort. It follows therefore that the action on the law side of the Court must be dismissed.

(2) The fee in this land is unquestionably in the State of South Carolina. The State has only by its Legislative action, made the defendant its agent in managing this land and other property. To preserve the fee is unquestionably the duty of the State. How can its property be made liable to a sale to pay any judgment without a failure on its part to keep the legacy to it by Mr. Thomas G. Clemson, intact.

This is very well illustrated in the case of Lowry *vs.* Thompson *et al.* 25 S. C., 416 and Columbia Water Power Co. *vs.* Columbia Electric Street Railway Co. 43 S. C., 155.

Thus it is manifest that the State has such an interest in this suit, that its presence as a party is imperatively necessary. The State has consented to be a party.

It is the judgment of this Court that the judgment of the Circuit Court be, and the same is, affirmed.

158 [Endorsed:] 6384 The State of South Carolina In the Supreme Court 10th Circuit Oconee County Dr. John Hopkins Appel't *v.* the Clemson Agricultural College, &c. Resp'd't. Affirmed Opinion by Y. J. Pope C. J. We concur. Eugene B. Gary A. J., Ira B. Jones A. J. Please protect draft for $1.50. Report Supreme Court of South Carolina, Clerk's Office Columbia S. C. Filed 23 Nov. 1906. U. R. Brooks, Clerk.

159 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1906.

DR. JOHN HOPKINS, Plaintiff-Appellant,
against
THE CLEMSON AGRICULTURAL COLLEGE, Defendant-Respondent.

Petition for Rehearing.

After careful consideration of the petition herein the Court is satisfied that no material question of law or of fact has either been overlooked or disregarded.

It is therefore ordered, That the petition be dismissed and that the order heretofore granted staying the remittitur be revoked.

[Seal Supreme Court of South Carolina.]

Y. J. POPE, *C. J.*
IRA B. JONES, *A. J.*
EUGENE B. GARY, *A. J.*

A true copy.
U. R. BROOKS, *Clerk.*

[Endorsed:] Supreme Court of South Carolina, Clerk's Office, Columbia, S. C. Filed 26 Jan'y 1906. U. R. Brooks, Clerk.

160 [Endorsed:] State of South Carolina In the Supreme Court April term 1906 Dr. John Hopkins Appel't *v.* The Clemson Agricultural College Resp'd't Petition for Rehearing Dismissed. Supreme Court of South Carolina, Clerk's Office Columbia, S. C. Filed 26 Jany. 1907, U. R. Brooks, Clerk.

161 STATE OF SOUTH CAROLINA:

In the Supreme Court.

DR. JOHN HOPKINS, Plaintiff-Appellant,
versus
THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, a Corporation Created by and Existing Under the Laws of the State of South Carolina, Defendant-Respondent.

I, U. R. Brooks, Clerk of the Supreme Court of South Carolina do hereby certify that the foregoing are true copies of the agreed case, opinion, bond, assignment of error, petition for writ of error, and the writ of error and citation.

Witness my hand and the seal of the Supreme Court of South Carolina at Columbia this the 23d day of September 1908.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of Supreme Court of the State of South Carolina.

Endorsed on cover: File No. 21,339. South Carolina, supreme court. Term No. 543. Dr. John Hopkins, plaintiff in error, *vs.* The Clemson Agricultural College of South Carolina. Filed September 28th, 1908. File No. 21,339.

UNITED STATES OF AMERICA:

IN THE SUPREME COURT.

OCTOBER TERM, 1910.

No. 70.

DR. JOHN HOPKINS, PLAINTIFF IN ERROR,

vs.

CLEMSON AGRICULTURAL COLLEGE, DEFENDANT IN ERROR.

We hereby agree that a copy of the petition for rehearing herein filed with the Supreme Court of South Carolina, and a copy of which it seems the Clerk of the said Court failed to certify to the Supreme Court of the United States as a part of the record may now be filed with the Clerk of the Supreme Court of the United States as a part of said record.

JOS. A. McCULLOUGH,
Attorneys for Plaintiff in Error.
J. P. CAREY,
Attorneys for Defendant in Error.

THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Tenth Circuit, Oconee County, April Term, 1906.

DR. JOHN HOPKINS, Plaintiff-Appellant,
vs.
THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, a Corporation Created by and Existing under the Laws of the State of South Carolina, Defendants-Respondents.

The petition of Plaintiff-Appellant, in the above entitled action, respectfully shows to the Court, that petitioner asks for a re-hearing of the appeal in the above entitled action, on the following grounds:

I. Because, it is respectfully submitted, several of the exceptions of appellant were overlooked and disregarded in the decision filed

herein on the 21st day of November, 1906, and especially exception XXXIII involving a material principle of constitutional law guaranteeing that no person can be deprived of his property without due process of law; also exception XXXIV involving the material principle of constitutional law that no person shall be deprived of property without due process of law nor shall private property be taken for public use without just compensation; also exceptions XLVII, XLVIII, XLIX, L, LI, LV, and LVI, to which reference is craved.

II. Because, it is respectfully submitted, the principle of law involved in exceptions VI and VII were overlooked; that the State is merely a Trustee and the defendant is the equitable owner of the property; that the terms of the will of Thomas G. Clemson and the Act accepting the devise constitute a contract between testator and the State and fix the character of the corporation as a private eleemosynary corporation.

III. Because an agent of the State, whether incorporated or not, possesses no immunity from being sued. He must show in his defense to an action for interferring with private rights that he proceeds within the authority conferred by valis law, or his defense must fail. This is true whether the corporation be deemed either public or private, for neither one possesses the right of invading the private property of the citizen without due process of law, and this material principle of law appellant submits was overlooked.

IV. The so using of property of the State as to create a nuisance whereby a private person is deprived of use and enjoyment of his land is no less a wrong and injury than forcibly ousting him of possession and lawlessly taking and appropriating his property. Hence, while holding and controlling property of the State, its officers and agents can, no more than a private person, disregard the maxim *sic utere tuo ut alienum non laedas*, and this material principle of law, it is respectfully submitted, was overlooked.

Wherefore, petitioner prays that a re-hearing of the appeal be granted, and that the same be set down for re-argument and to this end that the remittitur be stayed.

R. T. JAYNES,
Attorney for Appellant and Petitioner Herein.

I certify that I am not concerned in the above-stated cause, and that there is merit in the above-stated grounds for the application for a re-hearing.

JOHN S. REYNOLDS,
Attorney at Law.

A true copy.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court of S. C.

THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Tenth Circuit, Oconee County.

DR. JOHN HOPKINS, Plaintiff-Appellant,
vs.
THE CLEMSON AGRICULTURAL COLLEGE, Defendant-Respondent.

Petition for Rehearing.

After careful consideration of the petition herein, the Court is satisfied that no material question of law or of fact has either been overlooked or disregarded.

It is therefore ordered, That the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

Y. J. POPE, *C. J.*
IRA B. JONES, *A. J.*
EUGENE B. GARY, *A. J.*

[Endorsed:] 70/21339. 6424. The State of South Carolina. In the Supreme Court, Tenth Circuit, Oconee County, April Term, 1906. Dr. John Hopkins, Appel't v. The Clemson Agricultural College. Petition for Re-hearing. Original. Supreme Court of South Carolina, Clerk's Office, Oconee, S. C. Filed 23 January, 1907. U. R. Brooks, Clerk.

[Endorsed:] File No. 21,339. Supreme Court U. S. October Term, 1910. Term No. 70. Dr. John Hopkins, Pl'ff in Error, vs. The Clemson Agricultural College of South Carolina. Stipulation of counsel and addition to record. Filed September 24, 1910.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 70.

DR. JOHN HOPKINS, PLAINTIFF IN ERROR,

vs.

THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, DEFENDANT IN ERROR.

ARGUMENT AND BRIEF OF R. T. JAYNES, ATTORNEY FOR PLAINTIFF IN ERROR.

Statement of Facts.

This action was commenced in the Court of Common Pleas of Oconee County, South Carolina, by the service of Summons and Complaint on the 1st day of September, 1905. The allegations in the Complaint show that Plaintiff is the owner in fee of the two tracts of land therein described; that he has been such owner and in possession thereof since January 9, 1880; that there are forty-two (42) acres of bottom land lying on the West side of Seneca River; that

it has been used by Plaintiff for agricultural purposes ever since its purchase; that prior to the construction of the dike these lands were fertile and well adapted to the growth of crops of corn; that since the erection of the dike said lands have gradually deteriorated in value until they are almost worthless for agricultural purposes; that in times of freshets said dike prevents the natural and accustomed flow of the waters of Seneca River; that by reason of the construction of the dike the entire volume of the waters in times of freshets is thrown upon Plaintiff's land and forced to flow with great volume and momentum in a comparatively narrow channel across Plaintiff's bottom land, whereby the natural bank on Plaintiff's side has been torn and washed away, as also the rich soil on his bottom land, to Plaintiff's damage in the sum of eight thousand dollars; that said injury has been continuous and so remains; that this damage and injury has been inflicted by the Defendant corporation, by and through its Board of Trustees, in erecting and maintaining the dike. The Defendant answers, and, first, sets up a general denial; and, second, pleads exemption from suit on the ground that the corporation is an agent of the State in the erection of the dike, and consequently cannot be sued. (R. 21-4.)

On March 8, 1906, it was agreed between counsel that the jurisdictional issue raised by the Defendant in its answer should be determined, and the other features of the case would not be heard until this issue be finally disposed of. (R. 114). The case came on for trial before His Honor, James Aldrich, Presiding Judge, March (1906) Term of the Court of Common Pleas of Oconee County. On April 25th, 1906, Judge Aldrich filed his decree holding that the suit was against the State of South Carolina, and dismissed the Complaint. (R. 97-103). An appeal was taken to the

Supreme Court of the State on numerous exceptions to the decree. (R. 103-111).

By the will of Honorable Thomas G. Clemson, duly probated in the County of Oconee on the 20th day of April, 1888, he devised and bequeathed the Fort Hill Place consisting of 814 acres (the land upon which the dike involved in this action was constructed) and other property, real and personal, to his Executor, "*in trust*, that whenever the State of South Craolina may accept such donation from me for the purpose of thereupon founding an Agricultural College, in accordance with the views I have hereinbefore expressed, * * * then my Executor shall execute a deed of the said property to the said State, and turn over to the same all property hereinafter given as an endowment of said institution, to be held as such by the said State so long as it in good faith devotes said property to the purpose of the donation."

Item 2. "The following named gentlemen, seven in number, shall be seven of the Board of Trustees, to wit: R. W. Simpson, D. K. Norris, M. L. Donaldson, R. E. Bowen, B. R. Tillman, J. E. Wannamaker and J. E. Bradley; and the State, if it accepts the donation, shall never increase the Board of Trustees to a number greater than thirteen in all, nor shall the duties of said Board be taken away or conferred upon any other men or body of men. The seven Trustees appointed by me shall always have the right, and the power is hereby given them and their successors, which right the Legislature shall never take away or abridge, to fill all vacancies which may occur in their number by death, resignation or refusal to act, or otherwise. But the Legislature may provide, as it sees proper, for the appointment or election of the other six Trustees, if it accepts the donation. * * * The name of this institution is to be 'The Clemson Agricultural College of South Carolina.'"

In the preamble of his will testator says: "I have deter-

mined to devote the bulk of my property to the establishment of an Agricultural College upon the Fort Hill Place. This institution I desire to be under the control and management of a Board of Trustees, a part of whom are hereinafter appointed, and to be modeled after the Agricultural College of Mississippi as far as practicable," * * * "But I desire to state plainly that I wish the Trustees of said institution to have full authority and power to regulate all matters pertaining to said institution, to fix the course of studies, to make rules and regulations for the same, and to change them as in their judgment and experience may prove necessary."

By an Act of the General Assembly, approved November 27th, 1889, the State of South Carolina declares that it accepts the devise and bequest of Hon. Thomas G. Clemson, subject to the terms and conditions set forth in his said will, "and that the Treasurer of the State be, and he is hereby, authorized and empowered to receive and securely hold the said property, both real and personal, and to execute all necessary papers and receipts therefor, as soon as the Executor shall convey and transfer the said devise and bequest to the said State."

Section 4 of said Act provides: "That the said Board of Trustees is hereby declared to be a body politic and corporate, under the name and style of the Clemson Agricultural College of South Carolina. They shall have a corporate seal, which they may change at their discretion, and in their corporate name they may contract for, purchase and hold property, for the purpose of this Act, and may take any property any money given or conveyed by deed, devise or bequest to said College and hold the same for its use and benefit. * * * The Board may sell any of the personal property 'not subject to trust.' * * * They may sue and be sued, plead and be impleaded, in their corporate name, and may do all

things necessary to carry out the provisions of this Act, and may make by-laws for this purpose if they deem it necessary."

Pursuant to the power and in discharge of the trust vested in him by the will of Mr. Clemson, on March 6th, 1890, the Executor thereof conveyed, in fee simple, the Fort Hill Place and all the residue and remainder of the estate of testator (after payment of legacies) unto the State of South Carolina, "subject, however, to all and singular the uses, trusts, limitations and conditions hereinafter expressed and contained"—that is to say, "In trust for the purpose of founding upon the Fort Hill plantation herein and hereby conveyed, and hereinafter more fully described, an Agricultural College in accordance with the views, limitations and conditions set forth in the last will and testament and codicil of the said Thomas G. Clemson, hereinbefore referred to, and all holdings and balance of the said property as an endowment of said institution, under the terms and conditions in the said last will and testament and codicil."

By an Act, approved February 19, 1900, the corporation is clothed with all the rights, powers, duties and privileges that are conferred and imposed by the law of this State upon the railroad corporations. 23 Stat., 565; 1 Rev. Code, Secs. 1314, 1325 and 1316. By this Statute it is provided as follows: The Clemson Agricultural College of South Carolina is hereby authorized and empowered to construct, maintain and operate a railroad between the Clemson Agricultural College of South Carolina and Calhoun Station, on the line of the Atlanta and Charlotte Air Line Railway, with all the rights, powers, duties and privileges that are conferred and imposed by the laws of the State upon railroad companies.

The said Clemson Agricultural College of South Carolina, for the purpose of the construction of said railroad, shall be entitled to all rights and privileges (and be subject to all the

liabilities of railroad corporations) embraced in what is called the "General Railroad Law," and Acts amendatory thereof, as well as any Acts now existing, or hereafter to be passed, regulating the duties, privileges and rights of railroad companies.

The dike in question was built on and along the East bank of Seneca River on the tract of eight hundred and fourteen (814) acres devised by Thomas G. Clemson as aforesaid, and known as the Fort Hill plantation.

The lands of the Plaintiff, Dr. John Hopkins, lie on the West side of Seneca River, opposite the Fort Hill plantation, and opposite the dike in question. The entire tract contains two hundred and eighty-three acres, of which forty-two acres are bottom land. The bottom land was in a high state of cultivation and fertility in 1894 and 1895, when the dike was originally built. It was rich and productive, and had been for many years. Upon the construction of the dike and soon thereafter it is found that Plaintiff's bottom land became very much washed. The bank of the river was washed down and a great deal of it washed away. The channel of the river was widened. The trees on the bank of the river were washed away and deep holes and gullies washed through the bottom land. It is claimed that this damage and injury was caused by the dike, which confines the waters in times of freshets into a comparatively narrow channel and forces it to flow with great volume and momentum on, over and through Plaintiff's bottom land, thereby inflicting said damage and injury. (R. 41-2).

ARGUMENT.

For the sake of convenience we propose to discuss the issues involved in this appeal under the following heads:

(1) Constitutional Guarantees and Federal Questions Involved.
(2) The Clemson Devise and Acts of Incorporation.

(I)

CONSTITUTIONAL GUARANTEES AND FEDERAL QUESTIONS INVOLVED.

The guarantees for the protection of property of the citizen invoked by Plaintiff in error in his exceptions to the decree of the Circuit Court are as follows:

Exception XXXIII. Because the Fourteenth Amendment to the Constitution of the United States provides: "Nor shall any State deprive any person of life, liberty or property without due process of law." The allegations of the Complaint show that Plaintiff has been deprived of his property for all practical purposes as agricultural lands as effectually as if there had been a physical taking thereof; that Plaintiff has thus been deprived of his property by the Defendant corporation, acting by and through its Board of Trustees, and this constitutional guarantee has been violated by such action, whether taken pursuant to an Act of the Legislature or otherwise, and His Honor erred in not so holding. (R. 10.)

Exception XXXV. The State itself is an ideal person, intangible, invisible, immutable. The Government is an agent, and, within the sphere of the agency, a perfect repre-

sentative; but outside of that, it is a lawless usurpation. Whatever wrong may be attempted in the name of the State is imputable to its agency, the Government, and not to the State; for as it can speak and act only by law, whatever it does say or do must be lawful. That which, therefore, is unlawful, because made so by the supreme law, the Constitution of the United States, is not a word or deed of the State, but is the mere wrong and trespass of those persons, whether natural or artificial, who falsely speak and act in its name. The priciples of individual liberty and right of property cannot be maintained if, when violated, the judicial tribunals are forbidden jurisdiction in actions brought against the offenders, whether natural or artificial, who are the instruments of wrong, because they interpose the shield of the State, and His Honor erred in not so holding. (R. 11).

Exception XXXVI. The objection is that, as the State cannot be brought before the Court, this suit cannot be sustained against the Defendant corporation, the alleged agent of the State; whereas, even if the Defendant corporation be the agent of the State, and the State be exempt from judicial process, it would still be subversive of the best established principles to say that the law cannot afford the same remedies against the agent employed in doing the wrong, which it would afford against him could his principal be joined in the suit, and His Honor erred in not so holding. (R. 11).

The constitutional provisions guaranteeing protection of property are equally as sacred as the provision which forbids any State from passing laws impairing obligations and contracts. The term "Property" in this connection must be taken in its most general sense as embracing everything over which a man may have exclusive dominion. A person may be deprived of his property without any physical taking

thereof, and the guaranty is violated by that which destroys the value of property, takes away any of its essential attributes, or deprives the owner of the lawful use of it.

10 A. & E. Enc. L., 299.

The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without any physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated. It is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and, hence, any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.

In Re Application of Jacobs, 98 N. Y., 98.

The use of property is property itself within meaning of the Constitution.

St. Louis *vs.* Dorr, 41 S. W. Rep., 1094.

It is no answer for the wrong-doer, whether a natural or artificial person, to say that he or it represents the State, or that the State would be affected by the result of the action. On this point the Virginia Coupon cases are interesting and instructive.

Poindexter *vs.* Greenhow, 114 U. S., 270.

The Plaintiff brought his action in detinue on the 26th

day of April, 1883, against Samuel C. Greenhow, for the recovery of specific personal property, to wit: One office desk of the value of thirty dollars, before a Police Justice in the City of Richmond, who dismissed the case for want of jurisdiction. An appeal was taken by the Plaintiff to the Hustings Court, for the City of Richmond. The Hustings Court of the City of Richmond, however, affirmed the judgment below and dismissed the action. The several cases were brought to this Court on error to the Hustings Court of the City of Richmond, State of Virginia, for review. In the course of his opinion, Mr. Justice Matthews says::

> "It is next objected that the suit of the Plaintiff below could not be maintained because it is substantially an action against the State of Virginia, to which it has not assented. It is said that the Tax Collector, who is sued, was an officer and agent of the State, engaged in collecting its revenue, under a valid law, and that the tax he sought to collect from the Plaintiff was lawfully due; that, consequently, he was guilty of no personal wrong, but acted only in an official capacity, representing the State; and, in refusing to receive the coupons tendered simply obeyed the commands of his principal, whom he was lawfully bound to obey; and that, if any wrong has been done, it has been done by the State in refusing to perform its contract, and for that wrong the State is alone liable, but is exempted from suit by the Eleventh Article of Amendment to the Constitution of the United States, which declares that 'The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of ano-

ther State, or by citizens of or subjects of any foreign State.'

"This immunity from suit, secured to the States, is undoubtedly a part of the Constitution, of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. That immunity, however, does not exempt the State from the operation of the constitutional provisions that no State shall pass any law impairing the obligation of contracts; for it has long been settled that contracts between a State and an individual are as fully protected by the Constitution as contracts between two individuals. It is true that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the Courts of the United States, by a direct suit against the State itself, on the part of the injured party, being a citizen of another State or a citizen or subject of a foreign State. But it is equally true that whenever, in a controversy between parties to a suit, of which these Courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised with whatever legal consequences, to the rights of litigants, may be the result of the determination. The cases establishing these propositions, which have been decided by this Court since the adoption of the Eleventh Amendment to the Constitution are numerous.

Fletcher *vs.* Peck, 6 Cranch, 87.

N. J. *vs.* Wilson, 7 Cranch, 164.
Green *vs.* Biddle, 8 Wheat., 184.
Providence Bk. *vs.* Billings, 4 Pet., 514.
Woodruff *vs.* Trapnall, 10 How., 190.
Wolff *vs.* New Orleans, 103 U. S., 358.
Jefferson Branch Bk. *vs.* Skelly, 1 Black, 436."

* * * "The *ratio decidendi* in this class of cases is very plain. A Defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can only act through agents, and can command only by laws. It is necessary, therefore, for such a Defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the Defendant in the present case undertook to do. He relied on the Act of January 26, 1882, requiring him to collect taxes in gold, silver, United States Treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative Act of the Government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot, and what it cannot do it certainly, in contemplation of law, has not done. The Constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the Defendant to receive the coupons tendered in payment of taxes, and declared

every step to enforce the law, thereafter taken, to be without warrant of law, and, therefore, a wrong. He stands, then, stripped of his official character, and confessing a personal violation of the Plaintiff's rights, for which he must personally answer, he is without defense.

"In the discussion of such questions the distinction between the Government of a State and the State itself is important and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the Government are the acts of the State, because within the limits of its delegation of power, the Government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The Government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both Government and State are subject to the supremacy of the Constitution of the United States and of the laws made in pursuance thereof. So that, while it is true in respect to the Government of a State, as was said in

Langford *vs.* United States, 101 U. S., 341,

that the maxim that the King can do no wrong has no place in our system of Government; yet it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its Government and not to the State, for, as it can speak

and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name.

"This distinction is essential to the idea of Constitutional Government. To deny it or blot it out obliterates the line of demarcation that separates Constitutional Goverment from absolutism, free self-government based on the sovereignty of the people, from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State—to say, *'L'Etat c'est moi.'* Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle-field and the scaffold, if their limitations and restraint upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple and naked, and

of communism, which is its twin—the double progeny of the same evil birth.

"It is still urged upon us, however, in argument, that notwithstanding all that has been, or can be said, it still remains that the controversy disclosed by the record is between an individual and the State; that the State alone has any real interest in the determination; that the practical effect of such determination is to control the action of the State in the regular and orderly administration of its public affairs; and that, therefore, the suit is, and must be, regarded as a suit against the State, within the prohibition of the Eleventh Amendment of the Constitution. Omitting for the time being the consideration already enforced, of the fallacy that lies at the bottom of this objection, arising from the distinction to be kept in view between the Government of the State and the State itself, the premises which it assumes may be admitted, but the conclusion would not follow. The same argument was employed in the name of the United States in the Lee case and did not prevail. It was pressed with the greatest force of which it was susceptible in the case of

Osborn *vs.* Bank of U. S.,

and was met and overcome by the masterly reasoning of Chief Justice Marshall.

"The fancied inconvenience of an interference with the collection of its taxes by the Government of Virginia, by suits against its tax collectors, vanishes at once upon the suggestion that such interference is not possible except when that Government seeks to enforce the collection of its taxes contrary to the law

> and contract of the State and in violation of the Constitution of the United States. The immunity from suit by the State, now invoked vainly to protect the individual wrong-doer, finds no warrant in the Eleventh Amendment to the Constitution, and is in fact a protest against the enforcement of that other provision which forbids any State from passing laws impairing the obligation of contracts."

In the case of

Davis *vs.* Gray, 16 Wall, 203,

it was held, among other things, as follows:

A Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law, in conflict with the Constitution or Statute of the United States, when such execution may violate the rights of the complainant.

Where the State is concerned, it should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the Court may proceed to decree against the officers of the State in all repsects as if it were a party to the record.

Making a State officer a party does not make the State a party, although its law may have prompted his action, and the State may stand behind him as the real party in interest.

In that case, the State of Texas having made a grant of the alternative sections of land along which the railroad company had surveyed the land at its own expense and located a road through it, the Commissioner of the State Land Office and the Governor of the State were, in violation of the rights of the company, selling and delivering patents for the sections to which the company had a vested right. The Circuit

Court enjoined them from so doing by its decree, which was affirmed by this Court.

One of the leading cases upon the subject is

United States *vs.* Lee, 106 U. S., 196.

What was the Lee case?

> "By direction of the Executive Department of the Government, proceeding, as was supposed, under legislative authority, Kaufman and Strong, as officers and agents of the United States, held possession of certain real estate in Virginia known as Arlington, and constituting a national cemetery in which were interred the remains of Union soldiers. An action was brought by Lee in a Circuit Court of the United States against Kaufman and Strong to recover possession. The action proceeded upon the ground that the legal title and right of possession were in the Plaintiff. The Attorney General of the United States, without submitting the rights of the Government to the jurisdiction of the Court, suggested in writing that the property in dispute was held, occupied and possessed by the United States as a military station, through its officers and agents having actual possession for the Government, but without any personal interest in it; and, therefore, that the Court had no jurisdiction of the subject of the controversy. Upon these grounds he moved that all further proceedings be stayed and dismissed. The motion was denied. The same question was raised by the answers of Kaufman and Strong. There was a verdict and judgment against the Defendants."

In delivering the opinion of the Court, Mr. Justice Miller, among other things, says:

> "Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the Plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the Constitution are of that character which it is intended the Courts shall enforce, when cases involving their operation and effect are brought before them. The instances in which the life and liberty of the citizen have been protected by the judicial writ of habeas corpus are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the Government.
>
> *Ex parte* Milligan, 71 U. S., 4 Wall. 2, (18:281.)
>
> "If this constitutional provision is a sufficient authority for the Court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the Government, what reason is there that the same Courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?"

Upon the general proposition that the possession by officers, on behalf of the United States, of property claimed by a citi-

zen, is sufficient of itself to protect those officers against suit by that citizen to recover possession, the Court said:

> "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the Plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it, for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion. But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation? In the case supposed the Court has before it a Plaintiff capable of suing, a Defendant who has no personal exemption from suit, and a cause of action cognizable in the Court—a case

> within the meaning of that term, as employed in the Constitution and defined by the decisions of this Court. It is to be presumed, in favor of the jurisdiction of the Court, that the Plaintiff may be able to prove the right which he asserts in his declaration. What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of Plaintiff—a right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the Court can proceed no further because it appears that certain military officers, acting upon the orders of the President, have seized this estate and converted one part of it into a military fort and another into a cemetery."

Assuming, upon the record before the Court, that the President had no lawful authority to place officers of the Government in possession of the property in question, and that Congress could not give him any such authority except upon making just compensation, the Court said:

> "The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the Government, however clear it may be made that the Executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the Executive and the legislative, to deprive anyone of life, liberty or property without due process of law, or to take private property without just compensation. These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they

regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution. As we have already said, the writ of habeas corpus has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the Executive and the legislative branches of the Government. See

Ex parte Milligan, 71 U. S., 4 Wall. 2 (18:281).
Kilbourn *vs.* Thompson, 103 U. S., 168, (26:377).

"No man in this county is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

Again,

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases Statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the Courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without any process of law, and without any compensation, because the President has ordered it and his officers are in possession? If such be the law of this country it sanctions a tryanny which has no existence in the monarchies of Europe, nor in any other

> government which has a just claim to well-regulated liberty and the protection of personal rights. It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the Court, the wrongful possessor can say successfully to the Court, 'Stop here; I hold by order of the President, and the progress of justice must be stayed.' That though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the Government, to which, by the Constitution, this duty has been assigned, has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen."

In the late case of

Wesley *vs.* Tindal, 167 U. S., 203,

the Lee case is quoted with approval, and many others on the same line.

In

Pennoyer *vs.* McConnaughy, 140 U. S., 1,

the opinion was delivered by Mr. Justice Lamar. Among other things, he says:

"One class is where a suit is brought against defendants, who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the Eleventh Amendment, an action against the State,"

citing

Osborn *vs.* Bank of United States, 22 U. S., 9 Wheat., 738 (6:204).

Davis *vs.* Gray, 83 U. S., 16 Wall., 203 (21:447).

Tomlinson *vs.* Branch, 82 U. S., 15 Wall., 460 (21:189).

Litchfield *vs.* Webster County, 101 U. S., 773 (25:925).

Allen *vs.* Baltimore & O. R. Co., 114 U. S., 311 (29:200).

Louisiana Board of Liquidation *vs.* McComb, 92 U. S., 531 (23:623).

Poindexter *vs.* Greenhow ("Virginia Coupon Cases"), 114 U. S., 270 (29:185).

In

Ex parte Tyler, 149 U. S., 164, 190 (37:689, 697).

The Chief Justice, referring to the review in

Pennoyer *vs.* McConnaughy, 140 U. S., 10 (35:363,365)

of previous cases, said:

> "The result was correctely stated to be that where a suit is brought against Defendants who claim to act as officers of a State, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the Plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State; or for compensation for damages; or, in a proper case, for an injunction to prevent such wrong and injury; or for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial—such suit is not, within the meaning of the amendment, an action against the State."

In the recent case of

Scott *vs.* Donald, 165 U. S., 58, 69 (41:632,633,)

the principle was again announced, Mr. Justice Shiras delivering the opinion, that a suit against individuals "who claim to act as officers of a State, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the Plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State, or for compensation for damages, * * is not, within the meaning of the amendment, an action against the State."

In

Wesley *vs.* Tindal, 167 U. S., 204,

Mr. Justice Harlan, speaking for the Court, says:

> "The withholding of such possession by Defendants is consequently a wrong, but a wrong which, according to the view of counsel, cannot be remedied if the Defendants choose to assert that the State, by them as its agents, is in rightful possession. The doors of the Courts of Justice are thus closed against one legally entitled to possession, by the mere assertion of the Defendants that they are entitled to possession for the State. But the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals, that the legal title and right of possession is in the Plaintiff. If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute, whereby the Plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, be not one against the State, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the Plaintiff and illegally withheld by the Defendants can be deemed a suit against the State. Any other view leads to this result: That if a State by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional

provision declaring that no State shall deprive any person of property without due process of law

(Chicago, B. & Q. R. Co. *vs.* Chicago, 166 U. S., 226, 236, 241—41:979)

the citizen is remediless so long as the State, by its agents, chooses to hold its property, for, according to the contention of the Defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the Court of the official character in which they hold the property thus illegally appropriated. It is true that even in such a case the citizen may, if he choose, rely upon the good faith of the State in the matter of compensation. But he is not compelled to part with his property for public use except upon the terms prescribed by the supreme law of the land, namely, upon just compensation made or secured."

In

Belknap *vs.* Schild, 161 U. S., 12.

cited by counsel for defendant, the facts were entirely different. The action was against an officer of the United States, as Defendant, in a suit in equity for infringement of letters patent granted to the Plaintiff for an improvement on Caisson gates. The Caisson gate was part of the dry dock on a navy yard of the United States, constructed and put in place by the United States and was the property of the United States, and held and used by the United States for the public benefit. It was held that the injunction would not lie against the Defendant, an officer of the Government, for infringement of the patent; but it is also held that officers or agents of the

United States, although acting under its order, are personally liable to be sued for damages for such infringement of a patent.

The Binding Authority of

United States *vs.* Lee, *Supra*,

is distinctly recognized and reaffirmed. The doctrine is announced that when the citizen, in one of the Courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, shall prevent him from using the means which the law gives him for the protection and enforcement of that right. The case of

Poindexter *vs.* Greenhow, (Virginia Coupon Cases),

was distinctly recognized and re-affirmed. In these cases the doctrine is expressly announced that the citizen is entitled to be free from molestation in person or goods in action for taxes, debts, dues or demands made by the State or its officers in violation of a constitutional right, and that the citizen may vindicate such right in all lawful modes of redress —by suit to recover his property, or suit against the officers individually to recover damages for taking it, by injunction to prevent such taking where it would be attended with irremediable injury.

In the Kelknap case the injunction was denied on the ground that the patent right in the invention does not give title to the thing made in violation of the patent. The patent law has nothing to do with property. The property in articles which are made in violation of a patent is, notwithstanding the privilege of the patentee, in the infringer, if he would otherwise have the property in them. Hence, the

Caisson gate, having been made by the United States, though in violation of the patent, yet having been made by it and in its possession as its property, of course, the Court could not order the removal of such gate. This is far removed from a case where the right in private property has been invaded by the unlawful act of an officer or agent of the State, inflicting damages or continuous injury, which can only be prevented by a restraining order of injunction.

In the case of

Herr *vs.* Central Kentucky Lunatic Asylum, 97 Ky., 458,

the Supreme Court of Kentucky holds that the case of

Williamson *vs.* Louisville Industrial School of Reform, 95 Ky., 251,

has no application to a case like the one at bar. In the Herr case the Supreme Court of Kentucky goes farther than we are asking in the present case. In that case the Central Kentucky Lunatic Asylum was created a body politic and corporate by the Legislature, for the specific purpose of caring for the insane, and thereby discharging a portion of the political and governmental functions of the State. Even such a corporation, it was held, could be restrained from maintaing a nuisance on lands of the State, whereby the right of property of Plaintiff was injured. In that case the Circuit Court, as in the case at bar, held with the Defendant, that the suit was against the State, and, hence, the Defendant could not be enjoined. But the Supreme Court, in an able opinion by Judge Lewis, holds that the judgment below was erroneous, and same is reversed. As the case is so similar to the one at bar, we quote from it as follows:

Mary Herr and others brought this action against Central Kentucky Lunatic Asylum, created by statute a body politic, and in their petition state: That they are, as was their intestate husband and father, owners, in possession of and reside upon a tract of land containing about 300 acres, used as a farm and garden, through which flows a small water course called Goose Creek; that adjacent to and above their land is a tract of about 400 acres, acquired and held by Defendant for use of the Commonwealth, upon which have been erected at expense of the State, buildings extensive enough to accommodate, and which do accommodate, about 1,000 persons, adjudged lunatics, besides about 100 attendants and servants; that Defendant has wrongfully built across said creek two dams, making two artificial lakes or ponds, whereby the natural flow of water has been greatly diminished; that Defendant dumps and causes to be carried through a sewer from said buildings into the creek all slops, offal and refuse matter of every kind, a large part, though, because of feeble flow of the creek, not all, of which passes through and upon the premises of Plaintiffs, whereby water of the creek, fromerly used for watering their animals and other farming purposes, has become unfit for any purpose, and the air rendered so noxious and offensive as to make their home unhealthy and untenable. Wherefore, they ask an injunction against Defendant maintaining the alleged nuisance and abatement of it, including removal of the two dams.

But to the petition a general demurrer was sustained, upon the principal ground, as stated in opinion of the Chancellor, and now urged in argument, that Defendant corporation is but an arm of the State,

and, consequently, cannot be sued without express legislative authority. In terms of the statute creating Defendant a corporation, it is not only given power to sue, but made, without qualification, liable to be sued. And if an action for the cause stated in petition of Plaintiffs cannot be maintained against it, we are at a loss to know what character of default or wrong it could be sued for.

But it seems to us, independent of statutory liability, Defendant is answerable for the wrong and injury complained of in the same manner, and to the same extent, as one or more natural persons would be, occupying the same attitude, which is that of agent or officer of the State.

As a necessary consequence of exemption of the State from suit without its consent, an action nominally against an officer, but really against the State, to enforce performance of its obligation in its political capacity, cannot be maintained. But if officers or agents of the State invade private right in a mode not authorized by the statute under which they claim to act, or if such statute is invalid, unquestionably the person injured has, at least, a preventive remedy, although the State may be affected by the proceeding, yet not a party to it.

As early as the case of

Osborne *vs.* Bank of United States, 9 Wheaton, 738,

in which an injunction was sought against officers acting under statute of a State, the rule was thus stated by Chief Justice Marshall:

"If the State of Ohio could have been made a

party Defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that if the real party cannot be brought before the Court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a Court of Chancery will not make a decree, unless all those who are substantially interested be made parties to the suit.

"This is certainly true where it is in the power of Plaintiff to make them parties. But if the person who is the real principal, the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."

The doctrine there stated has in numerous cases been since approved and applied by the Supreme Court, and this Court has never held differently. For exemption of the State from suit without its consent was intended for its own protection; not at all to enable agents and officers to do with impunity injury to private rights.

To say a Court of Chancery could not enjoin them entering upon and appropriating, without compensation, land of a private person, though done under color of statutory power, and in interest of the State, would be, indeed, a startling proposition. Yet so using property of the State as to create a nuisance, whereby such private person is deprived of use and enjoyment of his land, would be not less a wrong and

injury than forcibly ousting him of possession and lawlessly taking and appropriating it. For while holding and controlling property of the State, its officers and agents can, no more than a private person, disregard the maxim, *"Sic utere tuo ut alienum non laedas."* It cannot be that in such case a person injured would be wholly without remedy merely because the wrong-doers are agents or officers holding and controlling property of the State.

The case of

Williamson *vs.* Louisville Industrial School of Reform, 95 Ky., 251,

recently decided by the Court, is not like this case, because there damages for a personal injury were sued for against the corporation, agent of the State, controlling the institution, which, if recovered, would have been payable out of the trust fund. Here the remedy sought is injunction against continuance of a nuisance, and, as necessary consequence, abatement of it. And as the alleged wrong is such as to cause permanent mischief and continuous grievance, which cannot be otherwise than by injunction repaired or prevented; and it is moreover alleged Plaintiffs have and will continue to suffer injury to both their health and property unless the Court grants the relief, a *prima facie* cause of action is stated in their petition, and the Chancellor erred in sustaining the demurrer.

Judgment is reversed and cause remanded for further proceedings, consistent with this opinion.

In the case of

Bank of Hopkinsville *vs.* The Western Kentucky Asylum for Insane, 108 Ky., 357,

the same question was again before the Supreme Court. In that case it was held that damages could be recovered against the Defendant for so using the property of the State as to inflict injury upon the property of the Plaintiff. In the opinion by Judge White, he says:

> "The Appellants are the owners of a grist mill on the east fork of Little River, in Christian county, and as such are the owners of the right to maintain a dam across said stream, acquired by condemnation proceedings had in the year 1846. The right thus given to erect and maintain the dam was for the purpose of using the water power thus afforded by the dam in running the mill. The Appellee is a charitable institution, owned and conducted by the State, for the care and treatment of its insane citizens. The buildings and grounds of Appellee are situated some three-fourths of a mile from Little River, and it owns no land on the river except one acre acquired by its Commissioners by purchase, lying on both sides of the river, and including the river within the boundary, as it is not a navigable stream. On this acre on the river, Appellee has erected a pumping station, and by this means pumps out of the river, to a reservoir on the grounds, water as it is needed for domestic purposes, for the use of the inmates of the institution, as well as for the animals used in its work in carrying on the gardening and hauling necessary thereto. There are wells and springs on the grounds of Appellee, but in themselves these are insufficient, and it became necessary to go elsewhere for water, and then the acre was purchased. The pumping station of

Appellee is up the stream from Appellants' mill site. Appellants brought this action in the Christian Circuit Court for damages to the mill property by reason of the diversion by Appellee of the water from Little River, and thereby, as is charged, preventing a sufficient flow to run the mill. A demurrer to the petition was overruled, and Appellee now insists that this was error. The contention of Appellee being that it is a public charitable institution, established and maintained by the State, and its funds come wholly by public taxation collected into the public treasury, and from there distributed to Appellee, and being thus an arm of the State Government, an action cannot be maintained against it.

The argument of counsel on this point is quite strong and persuasive, but the question is not an open one in this State. In the case of

Herr *vs.* Asylum, 97 Ky., 458, (30 S. W., 971; 28 L. R. A., 394),

this identical question was fully considered, and there determined adversely to Appellee's contention. The Commissioners of the asylum are created a corporate body, with power to sue and be sued, without qualifications as to the causes of action. This must be held to be legislative consent.

Appellee filed answer to the petition, admitting the taking of the water as above stated, but alleged that the quantity thus taken was only so much as, of necessity, was required for domestic purposes of the institution, and being, as alleged, a riparian owner along the stream, as well as in fact an owner of the stream, it had a legal right to all the water necessary

for domestic uses of man and beast of the institution. It was pleaded, further, that on the date of the purchase by Appellants of the mill the pumping station of Appellee was in operation, and had been so used for some time, and any damages done by diverting the water from the stream, if there were in fact any damage, was done before Appellant became the owners, and for such damage the Appellants could not recover. To this answer Appellants replied by saying that, before the erection of the pumping station by Appellee, Appellants were the owners of the mill and had contracted a sale thereof to one Huffman, and that afterwards, Huffman not having paid for the mill, the contract of sale was rescinded, and the property was returned to Appellants, and that Appellants were the real beneficial owners all the time, and it was while Huffman was in possession of the mill that the pumping station was built. The deeds were filed, showing the conveyance to and from Huffman. A demurrer to this reply was filed, and, on motion, was carried back to the answer. The Court overruled the demurrer to the answer, and sustained the demurrer to the reply, and, Appellants failing to plead further, the petition was dismissed and hence this appeal.

We are of the opinion that the demurrer to the first paragraph of the answer, pleading that Appellee was a riparian owner, and as such had a right to use all water necessary for domestic purposes, should have been sustained. By the admitted facts, Appellee is not a riparian owner on the stream. Its institution is three-quarters of a mile from the stream, and it owns no land on the stream except the acre bought for the purpose of the pumping station. It is unneces-

sary to discuss the rights of the riparian owner on the stream, as, in our opinion, it has no application to Appellee's rights. It is not a riparian owner.

We are also of opinion that the demurrer to the second paragraph of the answer should have been sustained insofar as the facts pleaded are intended to bar Appellant's right to recover anything by way of damage. The facts pleaded in this second paragraph, and as shown to exist by the exhibit filed with reply, present a defense to any recovery for damage done to the mill prior to the deed from Huffman to Appellants. This deed, instead of showing a recision of the contract, shows a purchase by Appellants from Huffman. The consideration recited in the deed from Huffman to Appellants is the purchase money notes given, "and in further consideration of the said parties of the second part surrendering to said Huffman some unsecured notes which they hold against him." This shows that Appellants paid more for the mill property than they sold it for. But this fact will not bar a recovery by Appellants for the actual damage done to the mill property by reason of diversion of the water from the stream, if such there be, after they became the owners of the mill, and up to the filing of the petition herein. The reply presented no facts in avoidance of the second paragraph of the answer. The pleading relies on the exhibit filed therewith, and these show that there was no recision, but a purchase outright.

In view of a reversal, and a trial on the question of damages, we deem it not out of place to say that there can be no recovery for future or permanent damages to the mill property; for the reason that, depending on the seasons and rainfall, it is too uncertain to be

estimated with any certainty, but the recovery, if anything, will be confined to actual damage done during Appellants' ownership, up to the filing of this petition. For the reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion."

These are late cases from the Supreme Court of Kentucky. In both it is held that notwithstanding the corporation is an arm of the State Government, still, as the action taken by it amounts to an invasion of the private right of property, suit can be maintained against it. It is not a suit against the State, even though the corporation be established and maintained by the State, and its funds derived by taxation paid into the State Treasury and disbursed for the support of the institution. In each case there was an invasion of the right of property of the Plaintiff, and it is held that both actual damage may be recovered and the corporation enjoined from inflicting further injury.

The case of

Lowry *vs.* Thompson, 25 S. C., 416,

is not in conflict with these views. The Sinking Fund Commission of our State is not a corporation, but is composed of certain State officials charged with certain specific duties. The action was not against the members of the Sinking Fund Commission in their individual capacity, but, on the contrary, they were sued *as officers of the State.* This distinction is recognized by Mr. Justice McIver. On page 427 he says:

"It will be observed, however, that the Land Commissioner, neither singly nor in conjunction with the

> Advisory Board, was ever constituted a corporation, while the bank
>
> (The State Bank cases, 1-3, above quoted,)

was. Therefore, the analogy would not hold good."

Again, on Page 425, in differentiating the case from the cases of

> U. S. *vs.* Lee, 106 U. S., 196,
> Poindexter *vs.* Greenhow, 114 U. S., 270,

he says:

> "If, however, the action should be brought against the person in possession *as an individual,* and he, in his defense, seeks to justify his possession by alleging title to, or right of possession in, the State, then, as in the case of
>
> United States *vs.* Lee, *Supra,*
>
> he must establish such title or right of possession, and if he fails to do so, judgment goes against him *as an individual.*"

There is no analogy between it and the Kentucky cases or the case at bar. If we may use the expression, the Defendant corporation is sued in its *individual capacity.* It is not sued *as an agent of the State.* On the contrary, it is sued as a corporation and by reason of the express declaration in its charter that it may sue and be sued. There is no provision in the statute creating the Sinking Fund Commission that it may sue or be sued as a corporation or as an official entity. The Commissioners are State officials, charged with

the performance of purely governmental funtions, and, therefore, it is plain that a suit against them in their *official capacity* must necessarily be a suit against the State. With respect to individuals composing the Sinking Fund Commission, an action could be brought against them *as individuals*, just as in

United States *vs.* Lee,
Poindexter *vs.* Greenhow,
Wesley *vs.* Tindal.

If sued as individuals, and they defend in behalf of the State, it is plain that under the authority of these cases they would have to make their contention good by showing that their action was taken in an official capacity as agents of the State, in pursuance of a valid constitutional Act of the Legislature.

The case of

Water Power Co. *vs.* Electric Co., 43 S. C., 155,

is not in conflict with these views. In the opinion of the Supreme Court, by Mr. Justice Gary, it is distinctly held that the cause of action for damages growing out of the alleged injuries to Plaintiff's property by the action of the Defendant corporation was within the jurisdiction of the Court and could be tried. This issue was tried by the Circuit Court, and the judgment rendered by Judge Hudson on the merits involving this issue was affirmed by the Supreme Court. It was only as to the equitable cause of action whereby the Plaintiff sought to have declared null and void the contract between the State and the Defendant, leasing five hundred horse-power of waterpower, wherein the Defendant was to furnish the Penitentiary one hundred horse-

power for the purpose of running its machinery and lighting. A suggestion was filed by the Attorney General, showing that in this respect the State had interest which would be affected by granting the relief prayed for. "To grant such relief would have the effect of clogging the wheels of one of the branches of the State Government, to wit: Its Penitentiary." In the case at bar there is no such suggestion, and it is readily seen that no branch of the State Government can possibly be affected.

In the light of the foregoing decisions both causes of action stated in the complaint can be maintained. The dike was erected and has been maintained by the Board of Trustees.

(*See extracts from the minutes of the Board, and also of the Executive Committee authorizing and directing the construction of the dike.* (*R.* 62-5.)

It cannot be successfully contended that this is a suit against the State, and, hence, that it cannot be maintained. On this point, it may be conceded, for the sake of argument, that the title to the Fort Hill Place is in the State of South Carolina and that the State owns it as its property; still, we maintain that the property must be so used as not to inflict injury upon the private property adjoining and belonging to a private citizen. The immunity of the State from suit is a part of the Constitution, of equal authority with every other part, but no greater, and must be construed and applied in harmony with all the provisions of that instrument.

ACTS OF INCORPORATION AND KIND OF CORPORATION CREATED.

In Item II of his will Thomas G. Clemson constitutes, that

for the government of the College, when founded, a Board of Thirteen Trustees, of whom he nominates seven, and then declares that the State, if it accepts the donation, shall never increase the Board to a number greater than thirteen in all, nor shall the duties of said Board be taken away or conferred upon any other man or body of men. He then provides for the seven Trustees appointed by him to fill all vacancies which may occur in their number, and prohibits the Legislature from ever taking away or abridging this right. The Legislature can elect the other six Trustees and no more. He further declares:

> "I desire to state plainly that I wish the Trustees of said institution to have full authority and power to regulate all matters pertaining to said institution and to fix the course of studies, to make rules for the government of the same, and to change them, as, in their judgment, experience may prove necessary. * * *"

Thus we find the Board of Trustees created by testator with plenary powers to regulate all matters pertaining to the institution. Of this Board testator names a majority of seven. This provision is highly significant. It is pertinent to inquire, why did he do so? The answer is not hard to surmise. It is a provision of foresight, prudence and caution. He deemed it wise to make sure that his purpose could never be frustrated. He knew that he was making a valuable donation for the founding of the institution. He was giving to it the historic Fort Hill plantation, with all its hallowed associations, in the hope that it would become the seat of a great and useful institution of learning. He believed that in the years to come would be fulfilled the high expectations which then moved him. Nor does he stop here, for after making small pecuniary legacies, he devotes all the rest of his

estate, amounting to some sixty thousand dollars in money, as a fund for a perpetual endowment of the institution, the corpus to be held intact and the income spent for current expenses. Thus his will becomes the law of the institution. It gives continued direction and control, in all that pertains to the management of the College. In all departments his will is supreme, and beyond the power of the State, through the Legislature or any officer or agent, to change or modify in any respect. While it is not probable such an occasion will arise, yet let us suppose a radical difference of opinion should prevail among the members of the Board of Trustees; that on such question the seven Trustees nominated by testator should adhere to one view, and the six Trustees elected by the Legislature should adhere to another. What would be the result? It is plain that the seven Trustees, constituting the majority, would control. The endowment derived from testator's bounty and all permanent improvements would be subject still to the voice and direction of his seven Trustees. They, too, are supreme, in all matters pertaining to the institution. By their vote they can fix the course of studies, employ the professors, make rules for the government of the College, and change the same at their wish. Hence, for all time, the mind of Thomas G. Clemson, as expressed in his will, gives supreme control and direction to the affairs of the institution. So long as the policy and practice of those in power conforms to that embodied in his will, all is well. But let a clash come between the seven Trustees on the one hand and the six Trustees on the other, and it is not hard to predict how the contest would end. True, the State may give to its six Trustees the dispensing of moneys appropriated by it, but, when this is done, it has exhausted its power. No farther than the money appropriated may exert an influence, could the State speak. Should the condition of any appropriation be radically opposed to the plan and policy cre-

ated by testator, it would be the plain and obvious duty of the seven Trustees, representing the will and wish of testator, to stand firm, and decline the State's bounty on terms inconsistent with their trust. In view of this, it is obvious that the Legislature is bound to conform in all its enactments with the conditions and limitations set forth in the will, which becomes the organic law of the institution.

Under the terms and conditions of the Clemson devise and bequest the original Act of the General Assembly incorporating the College and the deed of trust, it is apparent that the franchises and corporate powers conferred in the charter are protected as a contract; that the corporation is a private and not a public corporation; the terms of the devise and the acceptance thereof constitute a contract; the entire corpus of the donation becomes a fund for the perpetual endowment of the institution; a binding contract is entered into between testator and the State, and the contract imbedded in the will and the charter becomes irrevokable.

Educational or other charitable corporations, founded by the benevolence of private individuals, are private corporations, and their charters are protected from legislative repeal or alteration. These rights are protected by the

Constitution of the United States, Art. I, Sec. 10,

which declares:

> "No State shall * * pass any * * law impairing the obligations of contracts."

This doctrine was illustrated in the celebrated case of

Dartmouth College *vs.* Woodward, 4 Wheat., 518,

decided in 1819 by the Supreme Court of the United States, in which the leading opinion was delivered by Chief Justice Marshall, and a strong concurring opinion delivered by Associate Justice Story. By the original charter the donations of Rev. Elleazer Wheelock and others were accepted by King George III in 1769, for the purpose of founding and endowing a seminary of learning, and a charter was granted accepting the benefactions, and incorporating the twelve persons named by the chief donor under the style and name of "The Trustees of Dartmouth College." The twelve Trustees by the original charter were given the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body. It was expressly stipulated on the part of the Crown that the corporation constituted as it then was, with its number of Trustees fixed at twelve, should continue forever. In 1816 the Legislature of New Hampshire passed three Acts to amend the charter and enlarge and improve the corporation. Among other alterations in the charter, the Act increased the number of Trustees to twenty-one and gave the appointment of the additional nine members to the Governor. A Board of Overseers was created with power to inspect and control the most important acts of the Trustees.

> * * * "It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the Crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted and on its faith the property is conveyed. Surely in this transaction

every ingredient of a complete and legitimate contract is to be found. The points for consideration are: (1) Is this contract protected by the Constitution of the United States? (2) Is it impaired by the Acts under which the Defendant holds?"

During the course of his reasoning on the first inquiry, he asks:

"Are the Trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties that flow from the sovereign authority?"

"That education is an object of national concern, and a proper subject of legislative permit; that there may be an institution founded by Government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to Government, none will deny, 'but is Dartmouth College such an institution? Is education all in the hands of Government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property so far that the will of the Legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society and deserve to be well considered. * * A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being a mere creature of law, it possesses only those properties which the charter of its creation confer upon it, either expressly, or as incidental to its very existence. These are such as are best calculated to effect the object for which it

was created. Among the most important are immortality, and, if the expression will be allowed, individuality; by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of a particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power by charter on a natural person. It is no more a State institution than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for government of a seminary in which youth is educated, would not become a public officer, or be considered as an officer of the civil government, how is it that an artificial being, created by law, for the purpose of being employed by the same individuals for the purpose, should become a part of civil government of country? Is it because the existence, its capacities, its powers, are given by law? Because the Government has given it power to take and hold property in a particular form, and for particular purposes, has the Government a consequent right substantially

to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. * * In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in the Trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they appear in Court at all, can appear only to complain of the Trustees. In all other situations they are identified with, and personated by, the Trustees; and their rights are to be defended and maintained by them. Religion, charity and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in Court, and claim or defend by the corporation. * * It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an Act of incorporation constitutes no security for the institution, believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the Legislature."

In conclusion on this point he says:

"The opinion of the Court, after mature deliberation, is that this is a contract, the obligation of which cannot be impaired, without violating the Constitution of the United States. On the second point it is held that the Acts of the Legislature are unconstitustituted for the will of the donors, in every essentiai mitted for the will of the donors, in every essential operation of the College.' "

In the case of

The Trustees for Vincennes University *vs.* The State of Indiana, 14 How., 268,

decided by the Supreme Court of the United States in 1852, the same doctrine was affirmed and extended. From the statement of facts it appears that on March 26, 1804, an Act of Congress was passed for the survey and disposal of the public lands, by which three land districts were established, and an entire township in each, in the State of Indiana, was reserved for the use of a seminary of learning, to be located by the Secretary of the Treasury. The Secretary of the Treasury, on October 18, 1806, located Township No. 2 in Gibson county for the use of a seminary in that district. On November 29, 1806, the Territorial Government of Indiana, by an Ordinance passed pursuant to its powers of legislation, established the Vincennes University, and incorporated the same by the name of "The Board of Trustees of the Vincennes University." The Act of incorporation accepted the donation by Congress, and after reciting the seminary lands under the Act of Congress, provided:

> "That the Trustees, in their corporate capacity, by a majority of them, should be legally authorized to sell, transfer, convey and dispose of any quantity, not exceeding four thousand acres, of said land, for the purpose of putting into immediate use the said university, and to have or rent the remaining part of said township to the best advantage for the use of said public school or university."

By virtue of this Act the complainants became possessed of said township of land and so continued during the Terri-

torial Government. The Trustees sold four thousand acres and rented a part of the residue. A college building was constructed by them at Vincennes. On January 22, 1820, a joint resolution of the Legislature was approved, appointing a Superintendent for the seminary township, with power to rent the improved lands, to collect the rents, and to account to the State. On January 2, 1822, the Legislature appointed Commissioners to sell the lands in that township. The lands were sold and the money was paid into the State Treasury. A part of the consideration money still remained unpaid when the bill was filed. The Trustees brought an action for accounting, and prayed that the money be paid to the complainants. The opinion of the Supreme Court was delivered by Mr. Justice McLean. It was held that the donation of land by the Government for the support of the university was like a donation by private individuals, and the Legislature of the State could not rightly exercise any power by which the trust was defeated. In the course of reasoning he says:

> "The legislative power of the Territory and State, in advancing the public interests, was bound to afford all the facilities necessary to carry out and secure the benign objects of Congress, in making these township reservations. This was done by a wise and liberal Act, in regard to the Gibson Township. The corporators were vested with all the necessary powers to carry out the trust. And for the purposes of the trust, the title became vested in them, as soon as they acquired a capacity to receive it. This corporation had no political powers, and could in no legal sense be considered an officer of the State. * *
>
> "So far as regards the trust confided to the complainants, there is nothing which, by construction, can make it a public corporation. * *

"The complainants, by accepting and exercising their corporate powers, acquired certain rights, and made certain contracts, which could not be impaired by the Legislature. They constituted an eleemosynary corporation, in which the State has no property, and can exercise no power to defeat the trust. But this has been done by the Legislature, not only by appointing an agent to collect the funds due to the corporation, and paying them into the State Treasury; but, by selling the lands, they have diverted the fund, for the preservation and management of which the corporation was instituted. This was an extraordinary proceeding, and was wholly without authority." * *

The Legislature of the State of Illinois could not transform the State Board of Education, created, established, and managed by the State Normal University, which was a private eleemosynary corporation, into a State institution by merely declaring it to be such, and by transferring its property to the State.

Bakewell *vs.* Board of Education, 33 N.E. Rep., 186.

So, where the State of Vermont had made to an incorporated school a grant of lands which had been sequestered by the Legislature for school purposes, which lands, by the terms of the grant, were to be held in trust for the use of the school forever, it could not, by a subsequent statute, recall the grant and make a different disposition of the lands, no right to do so having been originally reserved.

Franklin County Grammar School *vs.* Bailey, 62 Vermont, 467; 10 L. R. A., 405.

These and many other cases to the same effect are cited with approval in

Thompson on Corporations, Secs. 5385-5386, *Et Seq*

So, by the devise of the real estate and bequest of the personal property of Thomas G. Clemson to the State of South Carolina for the purpose of founding and endowing an institution of learning in accordance with the terms, limitations and trust set forth in his will, the acceptance thereof by the State, and the charter of the College creating the corporation in accordance with the terms of said will, a contract was entered into between the testator and the State of South Carolina, binding on the parties thereto, and forever exempt from a breach thereof or interference therewith by any Act of the Legislature which might attempt to change, alter or modify in any material respect, the terms of the compact. The will and the charter embody the terms of the contract between the parties, and the donations by testator as well as the donations by the State, or Federal Governments, expended in permanent physical improvements upon the real estate, such as buildings for the use of the institution, are protected from any transfer, sale or disposition thereof by the State, in the slightest degree, contrary to or violative of the terms of the contract. The Trustees exercise a special authority, created by the will of testator, and confirmed by the Act of incorporation.

Is the corporation public or private? Is it an instrumentality of the State, created and maintained for the purpose of accomplishing some political or governmental function, or is it a private eleemosynary corporation created and maintained for the purpose of imparting education to the youth of the State along agricultural and mechanical lines and branches incident thereto?

The foregoing cases recognize the doctrine that the ordi-

nary municipal corporations created by the State, and which are in a sense sub-divisions of the government of the State, wielding, under a delegated authority from the State, a portion of its political or governmental power, for certain local or general purposes of a public nature, are public corporations. Of this character is an incorporated city, a town, a county, a school district, a State penitentiary, a reformatory school for youthful criminals, a home for pauper or abandoned children, where the State assumes to stand in *Loco parentis*, where the State assumes to act as *parens patriae*. Such corporations partake mainly of political or governmental features, and when owned and maintained entirely at the expense of the State Government, the charter of such a corporation, and of none other, is capable of being changed, altered, modified, or revoked by an Act of the Legislature.

Thompson on Corporations, Sec. 5383, *Et Seq.*

But such a corportaion can be sued for any act or delict pertaining to the discharge of its functions as a corporation. Why?

What is a corporation?

> "The most usual conception of a corporation is that it is a collection of natural persons, joined together by their voluntary action or by legal compulsion, by or under authority of an Act of the Legislature, to accomplish some purpose, pecuniary, ideal, or governmental, authorized by the Legislature, under a scheme of organization and by methods thereby prescribed or permitted; with the faculty of having a continuous succession during the period prescribed by the Legislature for its existence, of having an individual name by which it may make and take contracts

> and sue and be sued, and of acting as a unit in respect of all matters within the scope of the purposes for which it was created."
>
> Thompson on Cor., Sec. 1.

Attention is called to the definition of a corporation by Chief Justice Marshal in the Dartmouth College case. Other definitions similar in substance have been repeatedly given by other Courts of last resort. In two early cases in New York, the question, what is a corporation? was discussed with exhaustive research. In one of theses cases the Court, speaking through Nelson, C. J., said:

> "We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity (1) to have perpetual succession under a special name and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and (3) to receive and enjoy, in common, grants of privileges and immunities."

In the same case Cowen, J., summed up the incidents of a corporation, mentioned by Blackstone, as follows:

> "These are, in short, the receiving of peculiar laws, and the making of by-laws for itself; perpetual succession both as to its privileges and property, the having one will, as collected from the power of the majority to make by-laws, and the being but one person in law—a person that dies not, but continues the same individual, though its parts may change."
>
> Thomas *vs.* Dakin, 22 Wend., 71.

Id. 91.

The definition of Kyd has been frequently quoted:

> "Though many things be incident to a corporation, yet, to form the complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities: (1) To have perpetual succession under a special denomination, and under an artificial form; (2) to take and grant property, to contract obligations, and to sue and be sued by its corporate name in the same manner as an individual; (3) to receive grants of privileges and immunities, and to enjoy them in common. These alone are sufficient to the essence of a corporation."

I Kyd on Cor., 70.

For many, perhaps most, purposes, a corporation is in law an ideal person. It is regarded as a unit for most purposes of legal procedure. It makes and takes contracts by its corporate name, and in that name it sues and is sued. The word "person" in a statute may be construed to refer to a corporation, as well as to a natural person.

Thomp. on Cor., Sec. 11.

Mr. Justice McLean, in

Falconer *vs.* Campbell, 2 McLean (U. S.), 195,

enumerates the ordinary powers of a corporation as follows:

> "1. Perpetual succession. 2. To sue and be sued,

and to receive and grant, by their corporate name. 3. To purchase and hold lands and chattels. 4. To have a common seal; and, 5. To make by-laws. Some of these powers are incident to a corporation, but they are all, generally, expressly given by statute in this country."

"Public corporations,"

According to Kent,

"are such as are created by the Government for political purposes, as counties, cities, towns and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good; and such powers are subject to the control of the Legislature of the State. They may also be empowered to take or hold private property for public uses; and such property is invested with the security of other private rights. So, corporate franchises attached to public corporations are legal estates coupled with an interest, and are protected as private property. If the foundation be private, the corporation is private, however extensive the uses may be to which it is devoted by the founder, or by the nature of the institution. A bank, created by the Government, for its own uses, and where the stock is exclusively owned by the Government, is a public corporation. So, a hospital, created and endowed by the Government, for general purposes, is a public and not a private charity. But a bank whose stock is owned by private persons, is a private corporation, though its object and operations partake of a public nature, and though the Government may have become a partner in

the association by sharing with the corporators in the stock. The same thing may be said of insurance, canal, bridge, turnpike and railroad companies. The uses may, in a certain sense, be called public, but the corporations are private, equally as if the franchise were vested in a single person. A hospital founded by a private benefactor is, in a point of law, a private corporation, though dedicated by its charter to general charity. A college, founded and endowed in the same manner, is a private charity, though from its general and beneficent objects it may acquire the character of a public institution. If the uses of an eleemosynary corporation be for general charity, yet such purposes will not themselves constitute it a public corporation. Every charity which is extensive in its object may, in a certain sense, be called a public charity. Nor will a mere act of incorporation change a charity from a private to a public one. The charter of the Crown, said Lord Hardwicke, cannot make the charity more or less public, but only more permanent. It is the extensiveness of the object that constitutes it a public charity. A devise to the poor of a parish is a public charity. The charity of almost every hospital and college is public, while the corporations are privte. To hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions since the time of Lord Coke."

2 Kent Com., 275, 276.

In

The State *Ex Relatione* Robinson *vs.* Carr, Auditor of State, 111 Indiana, 336,

we find a clear and concise exposition of this principle, expressed as follows:

> "The university, although established by public law and endowed and supported by the State, is not a public corporation in a technical sense. In the language of the Court of Regents of the
>
> University of Maryland *vs.* Williams, 9 Gill & Johns., 365,
>
> 'A corporation may be private and yet the act or charter of incorporation contain provisions of a purely public character, introduced solely for the public good. A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government, subject to control of the Legislature, and its members officers of the government, for the administration or discharge of public duties, as in case of cities, towns, etc.' "

In

Regents of the University of Maryland *vs.* Williams, 31 Am. Dec., 72,

it is said of the University of Maryland that it has none of

the characteristics of a public corporation because the State was not the founder of it, but merely gave it the capacity to acquire and hold property, and that its private character was not affected by subsequent endowments by the State.

In

Board of Education *vs.* Bakewell, 122 Ill., 339,

it is held that appropriations for a university by the State do not change the private character on which it was established by private benefactions, and that a declaration by the Legislature that a State Normal University, which was in fact a private corporation, was a State institution, and that its property belonged to the State, is a mere harmless declaration upon the statute book, having no effect.

Whenever and wherever an action would lie against a natural person, it will also lie against a corporation upon the same or similar state of facts. This doctrine is clearly established in the modern law of corporations.

(*c*) When the State Becomes a Corporator, it Retains no Attribute of Its Sovereignty.—In

Dabney *et al. vs.* Bank of the State of South Carolina,

a corporation created by the State, and of which the State was the sole stockholder, it was held that it could occupy no other position than such a corporation composed of private citizens would do. The case was tried on the Circuit before Carpenter, Judge, at Charleston, 1870. In the Circuit decree,

3 S. C., 139.

he uses this significant language:

> "When the State becomes a corporator, in that capacity, it retains no attribute of its sovereignty. It is regarded as an individual, so far as any exercise of control is concerned, in relation to the corporation. What an individual corporator may do, the State, as a corporator, may do, and no more."

This doctrine was affirmed on an appeal to the Supreme Court, the opinion being delivered by Moses, C. J.:

> "Though the bank was established on behalf of and for the benefit of the State, which held the relation to it of a sole stockholder, its obligations and responsibilities to its creditors are to be measured by the same standard which would be applied if it constituted a company representing the interests of individual stockholders. It can demand no privilege, immunity or exemption by reason of its connection with the State, nor is it subject to a higher responsibility because it represents a State as its only stockholder. In regard to its creditors, it can occupy no other position than a corporation composed of private citizens."

The same doctrine was previously announced with more elaboration in case of

The State *vs.* The Bank, 1 S. C., 76,

the opinion there also being delivered by Moses, C. J., who says:

> "The bank was a distinct corporation. Although its capital was furnished by the State, its profits to enure to the benefit of the State, and the faith of the State was pledged for its support, and to supply any

deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency, still, though brought into existence by the State, the legitimate administration of its affairs, within the limits of its charter, created business relations and associations, founded upon the credit of its capital, property and profits. In all its transactions these were looked to and accepted as the basis of its credit and responsibility.

"While it continued solvent it was a matter of little consequence to a creditor how far, or to what extent, the Legislature interfered by its control. When, however, the fact of its insolvency is apparent, whether the State is the sole stockholder of a co-stockholder with individuals, the fund which it supplied as capital no longer remains, and to allow it to claim and hold the assets of the company would be depriving the creditors of their right, and, in fact, using the assets as the means of reimbursing the stockholder, to their utter wrong and injury.

"The assets of the bank are all that is left to meet the debts of the corporation, and, if they are taken by the State from the hands of those who hold the title for the purposes designed by the charter, and who are amenable to suit, where is the remedy which the creditor held in his right of action?

"It does not at all change the nature of the relation of the bank to its creditors, that the State was the sole owner of the capital. The State, in its sovereign capacity, is distinct and separate from the bank. When it established a trading corporation, did it invest it with any of its sovereign power? or, because the State was the sole stockholder, did the charter which it conferred acquire any higher power by reason of the

> status of the stockholder, or were the judicial tribunals of the State to construe it by any other rule than that by which they would be guided if the corporation consisted alone of private persons?"

In these cases the principle is recognized and declared that when the State becomes a corporator, it retains no attribute of its sovereignty, and the corporation can sue and be sued, regardless of the fact whether the State be pecuniarily interested in the property or assets of the corporation. Can it make any difference whether the purpose of the corporation be the conducting of a business enterprise, the promotion of education or the dispensing of a charity? It seems that the same principle would be applicable to the corporations created and maintained for any and all of these purposes. Counsel for Respondent concede the application of this principle to business corporations, but they argue that it does not apply to a corporation having for its object the imparting of education. Where is the reason for such a distinction? They have failed to cite any authority to sustain this contention. It is supported by neither reason nor authority.

It is well to keep in mind the distinction between public corporations, which are merely governmental agencies and under the exclusive ownership and control of the State for the purpose of performing purely political or governmental functions, and private corporations not controlled by the State, though its general objects and purposes be of a benevolent or public character. There is a broad line of demarkation. The reason is plain. The State is a sovereign and charged with the performance of sundry political and governmental duties. These duties must be performed by either natural or artificial persons. The State can adopt either mode at its pleasure. One of its important functions is the punishment of crime. In the performance of this duty the State

provides prisons, such as the penitentiary, for the care and keeping of convicts, and reformatory schools, for the training, restraint, and, if possible, reclamation of youthful criminals. The State may do this through its regularly appointed and commissioned officers, or it may create a public corporation, under its control and management, charged with the same governmental duties.

When a corporation is created by the State solely for this purpose the principle may be recognized that judgment cannot be recovered against such a corporation for damages for personal torts resulting from the misfeasance or negligence of the State's officers or agents in performing their duties. The reason is obvious. It is that liability founded on the neglect of personal torts of public officers, engaged as servants in the performance of duties which the State, as a sovereign, has undertaken to perform, is denied, not on the narrow ground that such liability cannot be enforced, or that the State cannot be sued, but on the larger ground that no liability arises therefrom.

Moody *vs.* State Prison of N. C., 128 N. C., 12.

Judge Story in his work on agency, Sec. 319, says:

> "The government does not undertake to guarantee to any persons the fidelity of any of its officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments and difficulties and losses which would be subversive of the public interest."

In

Murdock Parlor Grate Co. *vs.* Com., 152 Mass., 28; also,

Bourn *vs.* Hart, 93 Cal., 321,

the same principle is recognized. In the latter case it is thus expressed:

> "The exemption of the State from paying damages for accidents of this nature does not depend upon immunity from being sued without its consent, but rests upon grounds of public policy which deny its liability for such damages."

These and many other cases are collated with approval in the Moody case, *Supra*. To this class of cases belongs the case of

> Williamson *vs.* Louisville Industrial School of Reform, 44 Am. Stat. Reports, 243, (95 Ky., 252),

cited by counsel for Defendant.

But this principle has no application to the case at Bar. Defendant is not a public corporation charged with the performance of any political or governmental functions of the State. The fact that its purpose pertains to general education of the youth of the State, and that it is an institution of learning founded for the benevolent purpose of fostering education, and may be regarded as quasi-public in its nature, does not render the corporation anything more than a private one. The corporation is not controlled by the State, but by its own corporate officials. It makes and enforces its own by-laws and regulations for the management of its affairs and property. To this end it is invested with all the rights, powers and privileges conferred, and made subject to all the responsibilities, regulations and restrictions im-

posed by the common law and by the statutes of this State upon corporate bodies. In the recent case of

Trevett *vs.* Prison Association of Virginia, 50 L. R. A., 564,

this distinction between public and private corporations is recognized. In that case it is held that a prison association is not a public corporation exempt from liability for its tort, where it is not controlled by the State, but makes and enforces its own by-laws and regulations for the management of its affairs, is invested with all the rights, privileges, and subject to all the responsibilities of corporations, and receives a reasonable compensation for its services from the State Treasury, although its objects are of a benevolent character, and it is required to make annual reports of its work to the General Assembly. The Plaintiff in that case brought suit for damages for the alleged pollution of a stream by the discharge therein, through sewers constructed for the purpose, of the refuse water, etc., from the closets of the buildings of the Prison Association, whereby the water of the stream used by plaintiff as a lower riparian owner, who conducted a dairy business, requiring the use of pure water for his cows as well as domestic purposes, was polluted. Held that the association was liable in damages for such injury and the defense interposed by the defendant, as in the case at Bar, that the suit was in effect against the State and could not be maintained, was overruled and the action held to lie. The judgment of the lower Court sustaining the defense was reversed by the Supreme Court, and the case sent back for trial on its merits.

The case of

Brown *vs.* People, 75 N. Y., 441,

also cited by counsel for Defendant, has no application. In that case appellant was convicted of assault and battery in Richmond County and sentenced to imprisonment in Kings County Penitentiary for six months. Appellant appealed from the judgment and sentence on the ground that the sentence was unlawful, and the Act of the General Assembly, allowing sentence to imprisonment in another county, was unconstitutional. The appeal was dismissed. Neither has the case of

Witter *vs.* Mission School District, 66 Am. St. Rep., 33,

any application. In that case the question litigated was as to the validity of an assessment for taxes upon a school district for street improvements. The assessment was held unlawful.

The modern doctrine on this subject, however, is that if an assault and battery be committed on behalf of and for the supposed benefit of a private or quasi-public corporation, the corporation may be sued. In the case of

Perry *vs.* House of Refuge, 63 Md., 20,

the Court says:

> With much earnestness of argumentation it has been contended that there can be no proper foundation for this action, because the House of Refuge is, like the Penitentiary of Maryland, an institution constituting a part of the Government of the State, and therefore is not civilly liable in its corporate capacity for the tortious acts of its agents employed with a view to the efficient discharge of its public

function. There is, however, a widely perceptible dissimilarity between this corporation and the penitentiary. The latter is under the exclusive control of the Government of the State. Its directors are appointed by the Executive; its other officers receive their appointments from the directors; are required to give bond, and the remuneration for their services is designated and established by statutory provisions by which the entire government of the institution is regulated and controlled. On the other hand, the subscribers to the House of Refuge are declared, by the Act of incorporation, to be a body politic and corporate, and each subscriber, who pays the required sum is constituted a member for life. The conduct of its affairs is entrusted to a board of twenty-four managers; and of this number ten are elected by the members of the association, ten chosen by the Mayor and City Council of Baltimore, and four appointed by the Governor of the State. Seven of these managers constitute a quorum for the transaction of business. They are authorized to make by-laws, ordinances and regulations, and to appoint officers, agents and servants, and to designate their duties. The Mayor and City Council are authorized to appropriate any sum of money, not exceeding $25,000, toward defraying the current expenses of the House of Refuge and St. Mary's Industrial School, and pecuniary aid is also received from the Treasury of the State.

It does not follow, however, that because a number of the Board of Managers are appointed by the State, and others by the Mayor and City Council of Baltimore, that the corporation is thereby converted into a public institution. In this Court and those

of other States, the exposition of principles, determining the *status* of such institutions in this respect, has been in an opposite direction. It has been distinctly declared that the appointment of trustees and directors by State or municipal authority, to participate in the management, does not divest these associations of the attributes of private corporations, and clothe them with the immunities and privileges appertaining to public institutions.

St. Mary's Industrial School for Boys *vs.* Brown *et al.*, 45 Md., 330.
Nelson, etc., *vs.* Cushing *et al.*, 56 Mass., 521.

It has been contended that a corporation cannot be made a Defendant in an action of this nature, the remedy being solely against the individual who committed the wrong. Not until a comparatively recent period has the law, in this respect, undergone important mutations. It was for a long time maintained as an undoubted principle that a corporation could neither sue nor be sued in an action of battery, the reason assigned being that a corporation could "neither beat nor be beaten in its body politic." The enlightened jurisprudence of the present age has ignored such metaphysical subtleties, and recognized a rule more in conformity with the modern tendency to respond to the demand for substantial justice in every exigency. It is now a principle, established by numerous adjudications, that if the servant of a corporation aggregate commit an assault by the authority of a corporation, an action of trespass for assault and battery may be maintained against such corporation. And if the assault is committed on be-

half of and for the supposed benefit of a corporation, the body politic, by ratifying the act, incurs the responsibility.

Moore *vs.* Fitchburg Railroad Corporation *et al.*, 4 Gray, 465.
Hewitt *vs.* Swift *et al.*, 85 Mass., 422.

In the consideration of questions of this nature it must not be forgotten that, in legal contemplation, a corporation is an artificial entity, and can only act through the intervention of its officers or agents. When the agent of an individual, acting within the scope of his designated duties, commits a trespass, the principal is constructively present and by implication authorizes and sanctions the act and thus incurs the legal responsibility.

It is obvious that this principle is necessarily applicbale in all suits against bodies politic and corporate. And it is important to advert to another fundamental rule. A corporate body is a mere creature of law; deriving all its powers from the Act of incorporation and existing solely by legal sanction within the limits prescribed by legislative authority. Within its sphere of action it is liable for torts as well as for infractions of contract; but beyond that point the individuals who participated in the pretended corporate acts are personally responsible.

Head & Armory *vs.* Providence Ins. Co., 2 Cranch, 127.
Rogers *vs.* Burlington, 3 Wall., 669.

It was accordingly held that the corporation could be sued

in an action for damages for tort by one of its officers or agents acting within the scope of his duties. In that case, it being conceded that the charity was public and the institution supported by a trust fund dedicated to a charitable use, it was held that such trust fund could not be reached for payment of damages for the unauthorized assault and battery upon plaintiff by an officer or agent of defendant. It was found as a matter of fact that the assault and battery was committed by an officer of the defendant while acting in disobedience of the rules and regulations adopted by the Board of Managers for the infliction of corporal punishment. It thus appearing that the tort was committed by an officer in disobeying the rules and regulations for the infliction of corporal punishment, he was acting beyond the scope of his authority, and, hence, he was personally responsible for damages, and not the corporation.

From these and numerous other cases the doctrine is recognized and enforced that a corporation established for the maintenance of a public charitable hospital would be liable in an action for damages for a tort committed, commanded or authorized by its Board of Trustees or Managers, or for the failure on their part to exercise due care in the selection of agents or employees. To this extent corporations endowed and established for the dispensing of a public charity are liable to respond in damages. To this extent the corporate funds could be reached, but no farther. For the personal torts committed by agents or employees of such corporations acting contrary to rules or orders, or beyond the scope of their employment, they would be liable personally instead of the corporation.

The Defendant in error cannot avoid the issue by attempting to impose the shield of the State. It is no sufficient answer to say that the action is brought against the property of the State; that the State has an interest in the subject of

the action, and the property of the State will have to respond to any judgment. The suit is against the corporation, and it, as well as a natural person, must respect the rights of property. Defendant is sued in its corporate capacity—in its *individual* capacity if the expression may be used—not as an *agent of the State.* When it asserts itself to be an agent of the State in the matter complained of, it must establish the assertion by valid law. It cannot avoid the issue by claiming to be such agent in the invasion of private property, even though property of the State may be affected thereby. It is a universal principle, where jurisdiction depends on the party itself, it is the party named in the record, and the suit may be maintained against an officer or agent of the State in his individual capacity when his action amounts to an invasion of the private right of property.

In

Osborne *vs.* Bank, 9 Wheat., 738,

it is held, a suit may be maintained to enjoin a State Auditor from collecting an unlawful tax, where the State is not made a party in the record, although exclusively interested in the subject matter of the suit.

Charles River Bridge *vs.* Warren Bridge, 11 Pet., 572,

action against a corporation acting as State agent in collecting tolls under an unconstitutional law, jurisdiction not taken away, because State not a party on the record;

United States *vs.* Lee, 106 U. S., 212,

officers and agents of the United States may be sued, although the Government cannot be sued; the claim that prop-

erty sued for is devoted to public use does not bar the right of action;

140 U. S., 10,

suit in equity by a purchaser against State Board of Land Commissioners not suit against the State;

Blanton *vs.* Southern Fert. Co., 77 Va., 337,

suit against State officer is not against the State and a commission may be enjoined from levying tax on manufactures in the guise of a charge for tags on packages.

McClanahan *vs.* Western Lunatic Asylum, 88 Va., 469.
Asylum *vs.* Miller, 1 S. E., 740.

A corporation created by the State for conducting an asylum is an organized legal entity, a personalty in law, with power to sue and be sued as a private person. The former case cites

Bank of United States *vs.* Planters' Bank of Georgia, 9 Wheat., 904,

in which Chief Justice Marshall says:

> "The State does not, by becoming a corporation, identify itself with the corporation."

The State by giving the corporation the capacity to sue and be sued, voluntarily strips itself of its sovereign character and waives all the privileges of that character. It acts

merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the corporating act.

Public corporations, whether municipal or simple agencies of the State, when clothed with the capacity to sue and be sued, to have a common seal, to take and hold property, and to transact business, are governed by the same laws and rules, and subject to the same regulations and limitations, that natural persons are, except so far as they may be exempted by positive law.

Id.

An action by a taxpayer to restrain the Comptroller General from drawing his warrants, and the State Treasurer from paying such warrants, for the salaries of officers of registration and election, provided for in the general appropriation Act, on the ground that the registration laws of the State are unconstitutional, null and void, is not an action against the State, nor is the State an indispensable party thereto.

Butler *vs.* Ellerbe, 44 S. C., 256.

Suit against individuals to prevent them, as officers of a State, from enforcing an unconstitutional statute to the injury of the rights of the Plaintiff, not a suit against the State.

Smyth *vs.* Ames, 169 U. S., 466.

If the real principle cannot be sued the law will apply the same remedies against the agent who can be sued in equity.

Osborne *vs.* Bank, 9 Wheat., 738.

If a case can be decided on its merits between the parties before the Court, it should be decided, though others might be interested.

Vattier *vs.* Hinde, 7 Pet., 263.

Injunction proper to restrain agents of State from entering on lands to divert a stream.

Baring *vs.* Erdman, 2 Fed. Cas., 786.

Transfer of certificates of State stock improperly issued by State agents may be enjoined.

Dalafield *vs.* State, 26 Wend., 221.

When the State is not a party and the Court has jurisdiction of the parties on the record, a decree should be made in equity against State officers assuming to act under an unconstitutional law. Their personal responsibility for the subject of the action being admitted, they must be held to have a real interest.

Bank *vs.* Osborne, 9 Wheat., 858.

The immunity of a State from suit does not cover its agents, who hold possession of property against which a third party has a valid claim.

Dunn *vs.* State University, 9 Or., 363.

State officers should be enjoined from diverting a fund collected and set apart for a specific purpose.

Chaffraix *vs.* Board, 11 Fed., 649.

Void statute can afford no protection to those who execute it.

9 Wheat., 868.

Suit against State Railroad Commission not against State.

154 U. S., 389.

State officers restrained from seizing liquor imported for private use.

Scott *vs.* McDonald, 165 U. S., 112.

An injunction to restrain executive officers of the State of South Carolina from continued and repeated acts of trespass in seizing and carrying away and confiscating for the use of the State the imported property of the complainant, under alleged authority of an unconstitutional statute, is not invalid on the ground that it is a proceeding against the State, or that it interferes with official discretion.

Id.

This case arose under the dispensary law of South Carolina, and illustrates the right of the citizen to the preventive remedy of injunction when his right of property is invaded. Another case arising in this State, and illustrating the same principle, is

Ex parte Tyler, 149 U. S., 164.

In this case the Receiver of the South Carolina Railway Company filed a bill in equity against the Treasurers and Sheriffs of eighteen counties through which the road ran, al-

leging that tax executions were about to be enforced against the property of the company, and praying an injunction: Held injunction properly granted.

RECAPITULATION.

By the weight of the authorities the following propositions are established:

The Clemson devise and the act of incorporation create a private eleemosynary corporation, known as "The Clemson Agricultural College of South Carolina," for educational purposes.

(2.) The State, by creating the corporation and clothing it with the usual corporate powers, has given the requisite legislative consent that it may sue and be sued in all respects as a natural person.

(3.) Where an officer or agent of the State, whether natural or artificial, claiming to act as such officer or agent, commits act of wrong and injury whereby the right of property of another is invaded, suit may be brought for recovery of the property, or for compensation and damages, or, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, and it is not a suit against the State.

(4.) The constitutional guarantee of protection to property forbids the taking of property for private use without consent, or for public use without just compensation being made therefor. The unlawful encroachment upon or injury to real property by any person, natural or artificial, for private or public use, warrants suits against such person, whether acting for himself or as agent of the State.

(5.) A nuisance cannot be created on the property of the State by an officer or agent, whereby injury is inflicted upon the real property of the citizen, and for such injury suit may be brought against such officer or agent in an indi-

vidual or corporate capacity for recovery of actual damages, and for injunction to prevent further injury.

But aside from authority, let us look at the matter a moment from the standpoint of reason. A corporation is created for some purpose. Its business may be commercial, industrial, charitable or educational. So far as its ability to protect itself by suit, or its liability to suit, is concerned, it is a matter of indifference whether certificates of stock be issued. If the nature of the business be such as to require the issuance of stock, there may be one or more stockholders; but if the business be of a charitable or educational nature, stock may or may not be issued. But how can this affect the question of its liability to suit, or its ability to protect itself by suit? Being a corporation, it is a distinct legal entity; and even if the power to sue and be sued be not expressly given, it must necessarily be implied; otherwise it could not be considered a person in law. Being a person in legal contemplation, it must be considered as endowed with the usual rights and liabilities of a natural person before the law. As a natural person may inflict injury on the property of another, so may the artificial. Suppose an act of incorporation should attempt to create a corporation, and clothe it with power to sue and be sued upon its contract, and then provide that it should be exempt from suit for the invasion of the right of property, or declare that it could take property for either private or public use without consent and without compensation; and in pursuance of its statutory exemption from suit, it should take or injure property of another, can there be any doubt that so much of the statute as declares such exemption from suit would be unconstitutional, null and void? Thus, in the light of reason, it is seen that the *"sue and be sued"* provision in the charter of Defendant cannot be restricted to suit on contracts, as held in the Circuit decree. The decree legislates into the act a provision that is not

found there, and if it were, it would be clearly unconstitutional. It would afford no protection; and when the corporation, whether public or private, commits a tort upon the property of another, or so uses its property, or property in its custody and control, as unlawfully to injure another, it must answer before the Court for its wrong. How else can it be held responsible? Can it be a creature of the law, and yet be above the law? Is it possible, under our system of constitutional government, so to clothe any being, natural or artificial, with arbitrary power that it can deprive another of his property for either private or public purpose, and the owner stand stripped of all redress by the law of the land? This is a novel conception, and whenever asserted, since the days of Runnymede, whether by kingly prerogative or otherwise, it has met with great resistance. Not a few of the English Judges in troublous times were unfrocked because their fidelity and independence would not permit them to make a farce of justice for royal favor. The common law is the growth of centuries, and when transplanted on American soil it became the sure foundation of our institutions. Ours is a constitutional government, and the Constitution is supreme. The ideal State can do no wrong; and when its false or mistaken representative transgresses the law, he finds the way of the transgressor hard. The State says to him: "It is your wrong, not mine. You must answer, because you are the transgressor."

It seems to be the irony of fate that on the historic Fort Hill plantation, so long the home of the greatest statesman the South has ever given to the country, and one who was ever jealous of the rights of the citizen, action should be taken resulting in the invasion of the private right of property. Such action is not in keeping with the spirit which animated the former owner, who ever stood as the towering champion

of the rights of the ruled against the ruler. In his Disquisition on Government, page 12, we find this significant remark: "Such an organism as will furnish the means by which resistance may be systematically and peaceably made, on the part of the ruled, to oppression and the abuse of power on the part of the rulers, is the first and indispensable step towards *forming* a constitutional government."

Again, on page 275: "A sovereign may voluntarily impose restrictions on his acts, without, in any degree, exhausting or impairing his sovereignty."

Again, he says in a celebrated speech: "It is on the extreme limits of right that all wrong and encroachments are most sensibly felt and most easily resisted." It matters not whether the encroachments on the rights of the individual be made in the name of the State or National Government, by any person or agency assuming to act in behalf of either, the principle warranting resistance for the protection of life, liberty or property, is the same. Such resistance on the part of the citizen must be peaceable. He cannot resort to force, which would inevitably result in violence or bloodshed. Since he has neither the right nor the power to redress his wrongs by force, so much greater the necessity of clothing the Courts with the power to give ear to his complaint and vindicate his right in the appointed way. Since the days of Magna Charta and the Bill of Rights it has been the boast of English jurisprudence that life, liberty and property are secure against the arbitrary taking or despoiling thereof by those who bear rule. Has it been reserved for the dawn of the 20th century to see this boast become a myth? Yet, would it not, were the contention made for the Defendant written into a solemn judgment of this Court?

"No freeman shall be taken or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be

otherwise damaged, nor will we pass upon him nor send upon him, but by lawful judgment of his peers, or by the law of the land."

R. T. JAYNES,
Attorney for Plaintiff in Error.

APPENDIX.

AN ACT to Authorize Clemson Agricultural College of South Carolina to Construct, Maintain and Operate a Railroad Between the Clemson Agricultural College of South Carolina and Calhoun Station, on the Line of the Atlanta and Charlotte Air Line Railway and Other Roads and Ways.

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That Clemson Agricultural College of South Carolina is hereby authorized and empowered to construct, maintain and operate a railroad between the Clemson Agricultural College of South Carolina and Calhoun Station, on the line of the Atlanta and Charlotte Air Line Railway, with all the rights, powers, duties and privileges that are conferred and imposed by the laws of this State upon railroad companies.

SEC. 2. That the said Clemson Agricultural College of South Carolina, for the purpose of the construction of said railroad, shall be entitled to all the rights and privileges (and be subject to all the liabilities of railroad corporations) embraced in what is called the "General Railroad Law," being Chapter L, Sections 1542 to 1551, and Chapter LI of the Revised Statutes of South Carolina, 1893, and Acts amendatory thereof, as well as any Acts now existing, or hereafter to be passed, regulating the duties, privileges and rights of railroad companies.

SEC. 3. That after the construction of said railroad the said Clemson Agricultural College of South Carolina, for the purpose of operating the same, is empowered to lease,

in any lawful manner, the said railroad to any railroad company upon such terms as may be mutually agreed upon, or may enter into any agreement with any railroad company for the operation of the same.

SEC. 4. That said Clemson Agricultural College of South Carolina is authorized to construct and maintain tramways, macadam roads, electric roads, and such other highways within the incorporation as the Board of Trustees may deem expedient for the improvement and development of the corporation, and to this end shall have all the powers, privileges and rights conferred by the 1 and 2 Sections of this Act.

SEC. 5. That all Acts and parts of Acts inconsistent with this Act are hereby repealed.

Approved the 19th day of February, A. D. 1900.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 70.

DR. JOHN HOPKINS, PLAINTIFF IN ERROR,

vs.

THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, DEFENDANT IN ERROR.

ARGUMENT AND BRIEF OF JOS A. McCULLOUGH, ATTORNEY FOR PLAINTIFF IN ERROR.

Statement of Facts.

On the 1st day of September, 1905, the Plaintiff in Error brought a suit in the Court of Common Pleas, against the Defendant in Error, for the sum of eight thousand dollars damages, which he alleges his property sustained by reason of the erection of a dike by the Defendant in Error, and to enjoin the maintenance of said dike. The Court of Common Pleas for said County and State dismissed the complaint upon the ground that it was a suit against the State without

its consent, and, upon appeal, the Supreme Court sustained the said judgment. The Plaintiff in Error petitioned for a rehearing, alleging among other things that the effect of the judgment was to deprive him of his property without due process of law, in violation of both the State and Federal Constitutions, and this petition was dismissed. In his exceptions to the rulings of the Circuit Court, this point was made by several exceptions, and in its opinion the Supreme Court over-ruled these exceptions. We will not attempt to give an extended statement of the facts of the case, but will call attention only to those facts in the record which bear upon the one question which we shall argue. A full statement of the facts will appear in the brief of our colleague, Mr. R. T. Jaynes.

ARGUMENT.

It will be observed that the Circuit decree holds that the Board of Trustees of the Clemson Agricultural College of South Carolina are agents of the State; that the State holds in fee the eight hundred and fourteen acres of land upon which the dike is erected, and that the State "founded and is maintaining the Clemson Agricultural College of South Carolina." (R. 101). In its opinion the Supreme Court sustains this contention. (R. 116). The Plaintiff in Error contends that the effect of this decision, if the Supreme Court be wrong, is to deprive him of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. Surely he has not had his day in Court as to the merits of his controversy. (See Exception 23, page 10). That this Court has jurisdiction to review the said decision of the Supreme Court of South Carolina is settled, we submit, by the following cases:

Scott *vs.* McNeal, 154 U. S., 34;

Water Power Co. *vs.* Street Railway Co., 172 U. S., 475;
General Oil Co. *vs.* Crane, 209 U. S., page 211,

and other cases unnecessary to cite here. Is this a suit against the State without its consent, as held by the Supreme Court of South Carolina? It will be observed that in the charter of the Defendant in Error, it is provided, among other things, that the said corporators "may sue and be sued, plead and be impleaded, in their corporate name." (R. 52). In the erection of the dike upon its property the College was not engaged in the performance of a governmental function, and a suit against it would, therefore, lie.

Lowry *vs.* Thompson, 25 S. C., 416.

Indeed, the Record shows, at page 112, among the sources of revenue which the College enjoys are mentioned the sale of "dairy products," "other rents" and resources from other pursuits, in which, in its sovereign capacity, the State would not be permitted to engage. For damages resulting from any act, therefore, outside the scope of sovereignty, we submit, that under its charter the corporation could be sued. It appears, also, that authority is given the Defendant in Error to erect and operate a railway. If, in the exercise of this right it should commit a tort upon the person or property rights of an individual, would a suit seeking redress for such wrong be dismissed because a suit against the State? Under the decisions of the Supreme Court of South Carolina in such a case a Plaintiff would be without remedy. But is this Defendant in Error a public or a private corporation? The fact that among its other prerogatives it is engaged in furnishing education to the youth of the land, and chartered by said State for that

purpose, does not make it a public corporation or a governmental agency;

Dartmouth College *vs.* Woodward, 4 Wheat., 578,

and numerous other cases affirming that doctrine. The fact that the State may patronize the said institution does not make it a State institution unless it was *originally founded* by the State, and unless the State has *absolute* control of it, and has the unfettered ownership of the property. The distinction between public and private corporations, we submit, is thus clearly and correctly stated in

29 A. & E., pages 321 and 322,

and the cases in the notes, sustain the distinction thus made:

> "Where the universities and colleges are *originated* and prosecuted by the legislative enactment, independent of private contributions, they are, as a rule, held to be public corporations, and their charters may be altered, amended, or repealed by the Legislature at pleasure. The fact that private donations have been made to them either at the time of, or after their incorporation, does not alter their character. Where a college or university is founded by *private* donations, it is a private eleemosynary corporation over which the Legislature has no control, if none is reserved or given under its charter or in the general laws of the State."

The fact that the State may furnish aid or support to such an institution does not convert it into a public corporation. The authorities cited here to sustain this distinction and those to which attention will be herinafter called, fully sustain this

distinction. Let us then examine the record here and ascertain whether or not the Defendant in Error was "originated and prosecuted by legislative enactment independent of private donations," or whether it was "*founded by private donations.*" This brings us to the will of Thos. G. Clemson, who originated, and by his benefactions, founded the Clemson Agricultural College of South Carolina. His will and codicil thereto will be found in the transcript of Record at pages 45-51. After expressing his sympathy for the farmers of the State, and his belief "that there can be no permanent improvement in agriculture without a knowledge of those sciences which pertain particularly thereto," he says: "I have determined to devote the bulk of my property to the establishment of an agricultural college upon the Fort Hill place." He goes on to describe the character of the institution that he desires to establish and says, "I desire to state plainly that *I wish the Trustees of said institution to have full authority and power to regulate the matters pertaining to the said institution—to fix the courses of studies, to make rules for the government of the same,* and to change them, as in their judgment, experience may prove necessary, but to always bear in mind that the benefits herein sought to be bestowed are intended to benefit agricultural and mechanical industries." He further expresses the belief that in case the State of South Carolina saw fit to accept the bequest, "such appropriations will be made as will be necessary *to supplement* the fund resulting from the bequest herein made." He further directs that in case the State accepts the bequest that the property be turned over to it to be held as such by the State *so long as it, in good faith, devotes said property to the purposes of the donation.*" He further provides that in case the State declines to accept the bequest that his Trustees establish an institution which would carry out his wishes. He goes on to prescribe the number of Trustees, to wit, thirteen, and

nominates *seven* of that number and makes them *self-perpetuating*, and provides that the said State select a number, to wit, *six*, in such manner as it may decide. He further provides that the dwelling house shall never be torn down, and that certain articles of furniture shall always be open to inspection by visitors. By Act of the Legislature, (R. 51,) the Legislature accepted the terms of the devise. After incorporating the said board, the Act says, "and in their corporate name they may contract for, purchase and hold property, for the purposes of this Act, and may take any property or money given or conveyed by deed, devise and bequest to said College, and hold the same for its use and benefit; Provided, that the conditions of such gift or conveyance shall in no case be inconsistent with the purposes of this Act, and shall incur no obligation on the part of the State. They shall securely invest all the funds and keep all property which may come into their possession, and may sell any of the personal property not subject to trust, and reinvest the same in such way as they may deem best for the interest of said College. They may sue and be sued, plead and be impleaded, in their corporate name, and may do all things necessary to carry out the provisions of this Act, and may make by-laws for this purpose, if they deem it necessary."

It is also provided in Sec. 6 of the said Act:

"That for the purpose of erecting buildings on said Fort Hill plantation, and of purchasing stock and implements therefor, and paying expenses, as herein provided, the sum of three thousand dollars be, and the same is hereby appropriated, if so much be necessary, to be paid by the State Treasurer upon the order of the Board of Trustees of said College, signed by their President and Secretary: Provided, that not more than fifteen hundred dollars thereof shall be used in erecting buildings, fixtures or permanent improvements on said Fort Hill plantation pending litigation in re-

spect to said property;" and the following language is significant: "That all *personal* property purchased with money appropriated by the State *shall be taken and held by the Board of Trustees as property of the State of South Carolina;* and it shall be the duty of said Board of Trustees to make to the Legislature an annual report of the College, and of all farming operations and tests and experiments, and of all receipts and expenditures, with a statement of the condition of the property and funds of said College, and of all receipts and expenditures of money appropriated thereto by the State." It thus appears that a distinction is made by the Act itself so far as ownership by the State is concerned, of the property embraced in the *will* and the property purchased by the Trustees by money appropriated by the State. The Record shows further that the College is supported, not by annual appropriations on the part of the Legislature, but in addition to the fund received from the endowment by Mr. Clemson, its present sources of support are from tuition fees, the fertilizer inspection tax (paid by fertilizer companies), the Land Script Fund (from the General Government), and the sale of the products of the farm. (R. 112.) The Record further shows that after the Act accepting the bequest, the Executors of the will conveyed the property therein mentioned to the State of South Carolina *subject to the trust, limitations and conditions contained in Mr. Clemson's will.* (R., page 90). The Record further shows that subsequently other tracts of land were conveyed to the Defendant in Error (not to the State of South Carolina), one tract containing two hundred and eighty-eight acres (R. 91) and fourteen acres (R. 94.)

It thus clearly appears that the Clemson Agricultural College was founded by the benevolence of an idividual; that the Legislature has not absolute control thereof, but on the contrary, the control is vested absolutely in a Board of thirteen Trustees, seven of whom are nominated by the will of the

said Thomas G. Clemson, and are made self-perpetuating; that the State has not a fee-simple title to the said property, but holds the same in trust to carry out the provisions of the will just as an individual would do. We have found no case deciding a particular institution to be a public corporation or a State institution where the State did not have aboslute control and ownership.

Again, it will be observed that under the will of Thomas G. Clemson, if the Board of Trustees saw fit, they could open the doors of the institution to the colored as well as to the white. The Constitution of South Carolina, 1868, Article 10, Sec. 10, which was of force at the time the will went into effect and the bequest was accepted by the State, provides:

> "All public schools, colleges and universities of this State, supported in whole or in part by the public fund, shall be free and open to all the children and youths of the State without regard to race or color."

Now, suppose that the Trustees of Clemson Agricultural College had then passed a resolution admitting colored students, and said resolution stood unrepealed, the Constitution of 1895, Art. 11, Sec. 7, provides:

> "Separate schools shall be provided for children of the white and colored races, and no children of either race shall ever be permitted to attend a school provided for the children of the other race."

This provision is applicable now to all public schools of the State. Suppose an attempt were made to enforce it as against Clemson College under the conditions above assumed, what would be the result? This Court would unhesitatingly declare that if it was intended to apply to Clemson College it

would be unconstitutional, since by the will of Mr. Clemson, the said institution was open to the youths of the land, irrespective of race or color, if the Trustees so deemed expedient, and this was in accordance with the constitutional provision of 1868, in force at that time. Any effort, therefore, on the part of the State by subsequent legislation, whether by constitutional enactment or otherwise, to disturb this status, under the Dartmouth College case and other cases, would be declared unconstitutional. The said constitutional provision of 1895, however, *does* apply and could be enforced against all the *State* institutions. There is no disputing the logic of the situation. These views with reference to the character of this institution, we submit, are supported by the following authorities:

The case of

Lowry *vs.* Thompson, 25 S. C., 416,

does not sustain the position for which it was cited by the Supreme Court of South Carolina. That case is distinguished from this case by the decision of the Court at page 426:

"The State *vs.* The President and Directors of the Bank of the State of South Carolina, 1 S. C., 63;

Dabney, Morgan & Co. *vs.* The Bank of the State, 3 *Id.*, 124;

Bank of the United States *vs.* The Planters' Bank, 9 Wheat., 904;

Bank of Kentucky *vs.* Wister, 2 Peters, 318;

Briscoe *vs.* Bank of Kentucky, 11 *Id.*, 257;

Darrington *vs.* State Bank of Alabama, 13 How., 12;

Curran *vs.* State of Arkansas, 15 *Id.*, 304.

relied on by the counsel for the Plaintiff, have all been carefully examined, and do not appear to us to be applicable to the present inquiry. These cases, so far as we are at present concerned with them, only decide that the fact that a State owns a part or the whole of the stock of a banking corporation, does not exempt such corporation from suit under the rule that a State cannot be sued without its consent. Aside from the fact, which of itself would be conclusive of the inapplicability of these cases, that in most, and probably all of them, the charters of the corporations contained express provisions that they could sue and be sued, it is well settled that, in the eye of the law, a corporation and the individuals who compose it are totally distinct and different persons. Hence, an action against a corporation can never be regarded or treated as an action against the individuals who hold its stock. Without some special provision in the charter to that effect, or some general law of the State, the individuals who compose the corporation are not only not to be regarded as parties to an action brought against it, but their individual property could not be reached under a judgment against the corporation. From this it follows naturally and logically that when an artificial person called a corporation is brought into existence, it, like all other persons, natural as well as artificial, may be subjected to the process of the courts, and the fact that its stock is owned in part or in whole by the State, confers upon it no exemption from suit, as the corporation and the persons who compose it are totally distinct and different persons."

In

Yarmouth *vs.* North Yarmouth, 34 Me., 411,
56 American Decisions, 667,

it is decided:

"Trustees incorporated for purpose of investing and disbursing for support of public schools in a town a fund to be created by a sale of the town's property, form a private corporation independent of legislative control, unless on default of the performance of their duties judicially determined."

Board of Education *vs.* Bakewell, 122 Ill., 339.
10 Northeastern, 384.

"Appellant is but a trustee of this property to hold and administer it for the special purpose named in its charter—the education of teachers for the common schools. The benefactions were devoted by the donors to this special purpose and can be applied to no other. Appellant stands here as representing the donors, and their rights are to be defended and maintained by it."

State *vs.* Bank, 1 S. C., page 63.

It is decided:

"Though the capital of the Bank of the State of South Carolina was furnished by the State, and its profits enured to the benefit of the State, and the faith of the State was pledged to its support, yet it was a distinct corporation, having the ordinary powers and rights, and subject to the ordinary obligations of

banking corporations, with liability to suits by its creditors, and holding its property subject to their claims in preference to the claims of the State as its only stockholder."

* * * * * * *

At page 76 the Court uses this language:

"It does not at all change the nature of the relation of the bank to its creditors, that the State was the sole owner of the capital. The State, in its sovereign capacity, is distinct and separate from the bank. When it established a trading corporation, did it invest it with any of its sovereign power? or because the State was the sole stockholder, did the charter which it conferred acquire any higher power by reason of the status of the stockholder, or were the judicial tribunals of the State to construe it by any other rule than that by which they would be guided if the corporation consisted alone of private persons?"

* * * * * * *

"The authorities above referred to and many others which may be cited from the reported decisions of the Supreme Court of the United States, abundantly show that the fact of the capital having been furnished by the State does in no way vary or affect the responsibilities of the corporation to its creditors, and the rights of those creditors as against a corporation with which they dealt, looking to the grants in the charter as the security for their debts."

See also

Dabney, Morgan & Co. *vs.* Bank of the State of South Carolina, 3 S. C., page 124.

State *vs.* Carr, 111 Indiana, 335, 12 Northeastern, 318.

"*The University, although established by public law and endowed and supported by the State, is not a public corporation, in a technical sense.* In the language of the Court in

Regents University of Maryland *vs.* Williams, 9 Gill & J., 385-388,

"A corporation may be private, and yet the act or charter of incorporation contain provisions of a purely public character, introduced solely for the public good. * * * A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good, in the administration of civil government; an instrument of the government, subject to the control of the Legislature; and its members officers of the government, for the administration or discharge of public duties, as in the case of cities, towns, etc.

Yarmouth *vs.* North Yarmouth, 34 Me., 411;
North Yarmouth *vs.* Skillings, 45 Me., 133.

There are three classes of corporations, to wit: Public municipal corporations, the object of which is to promote the public interest; corporations technically private, but of a quasi public character, having in view some public enterprise in which the public inter-

ests are involved; and corporations strictly private;

1 Dill Mun. Corp., 52, 53.
Dartmouth College Case, 4 Wheat., 518.
Miners Ditch Co. *vs.* Zellerbach, 37 Cal., 543.
Foster *vs.* Fowler, 60 Pa. St., 27.

The Act under which the State University was established, made provision for a Board of Trustees, and enacted, "that they and their successors shall be a body politic, with the style of the 'Trustees of Indiana University;' in that name to sue and be sued, etc. This corporate body is invested with the power to possess, take, and hold in their corporate name, all the real and personal property of the university, for its benefit, and is authorized to expend the income thereof for the benefit of the institution. It is authorized to make all by-laws necessary to carry into effect the general purposes for which the institution was organized.

The corporation thus organized has none of the essential characteristics of a public corporation. It is not a municipal corporation. Its members are not officers of the government, or subject to the control of the Legislature in the management of its affairs; and the university fund, derived in the manner pointed out in Sec. 4595, does not belong to the State. That the university was established under the direct authority of the State, through a special Act of the Legislature, or that the charter contains provisions of a purely public character, nor yet that the institution was wisely established, and is and should be perpetually maintained at the public expense, for the public good does not make it a public corporation, or constitute its

endowment fund a public fund."

Montpelier Academy *vs.* George, 14 Louisiana, 395. 33 American Decisions, 588.

"There can be no doubt, that where a corporation is the mere creature of legislative will, established for the general good, *and endowed by the State alone*, the Legislature may, at pleasure, modify the law by which it was created. For in that case, there would be but one party affected, the government itself, and therefore not a contract within the meaning of the constitution. The Trustees of such a corporation would be the mere mandataries of the State, having no personal interest involved, and could not complain of any law that might abridge or destroy their agency. But it would be otherwise with a corporation such as that under consideration; for though a part of the endowment of the Montpelier Academy may eventually proceed from the State, yet they bestow nothing, until the institution may be able, from its own resources, to afford accommodations for forty scholars, when a sum not exceeding two thousand five hundred dollars, is to be annually paid out of the treasury, to be graduated by the number of indigent students that are boarded and instructed in the school. *So that the institution does, in truth, originate* in private charities, not at all affected in its essential character by the moneys given by the State. The Trustees and instructors do not thereby become agents or officers of the government, nor does the property purchased, or the donations made, appertain to the public. The power to appoint all the officers of the institution still abides exclusively in the Trustees, who fix the course of

studies, the salaries to be paid, fill all vacancies that occur, and administer and apply the funds of the institution at their pleasure."

Downing *vs.* Indiana State Board of Agriculture,
129 Indiana, 443.
28 Northeastern, 123.
128 L. R. A., 664.

Act, Indiana, March 4th, 1891, abolishing the State Board of Agriculture, and transferring all its property to another institution, is unconstitutional, since said State Board, though organized under Act, Feb. 14th, 1851, for the public benefit, is a private corporation.

* * * * * * *

At page 125 the Court quotes from

Angell & Ames on Corporation, at Section 14:

"The Bank of the United States, for example, if the stock belonged *exclusively* to the government, would be a public corporation; but inasmuch as there are other and private owners of the stock, it is a private corporation." In Section 31 it is said: "Private corporations are indisputably the creations of public policy, and in the popular meaning of the term, may be called 'public;' but yet, *if the whole interest does not belong to the government,* (as if the corporation is created for the administration of civil or municipal power, the corporation is private." In Sec. 32 it is said: "Nor does it make any difference that the State has an interest as one of the corporators; for it does

not, by such participation, identify itself with the corporation. Says Marshall, C. J., in

U. S. Bank *vs.* Planters' Bank, 9 Wheat., 907,

The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it." In Section 34 it is said: "A hospital founded by private benefaction, * * * it has been held, is not thereby constituted a public corporation, controllable by the government, nor does it make any difference that the funds have been generally derived from the bounty of the government itself." * * *

"In the case of

"Trustees *vs.* Woodward, 4 Wheat., 518,

it is held that *public corporations are such only as are founded by the government for public purposes, where the whole interests belong to the government.* In this case it is held that no authority exists in a government to regulate, control or change a corporation created by it, except when the corporation is, in the strict sense, a public one, and its franchises the exclusive property of the government itself. In such a case the officers of the corporation would be public officers. The corporation in this case was created by a charter, in which the trustees were mentioned by the name of the 'Trustees of Dartmouth College,' granting to them and their successors the usual corporate privileges and powers, and authorizing the Trustees who are to govern the college to fill up all vancancies

which may be created in their own body; and it was held to be a private corporation. In the case of

Board *vs.* State, 14 How., 268,

it was held that the Acts of 1806 and 1807, establishing Vincennes University, and incorporating the same by the name of the 'Board of Trustees of Vincennes University,' made it a private corporation, over which the State could not exercise control. See

Union Pac. R. Co. *vs.* U. S., and
Railroad Co. *vs.* Gallatin, 99 U. S., 700.

The State University was established by an Act which made provision for a Board of Trustees, and enacted that they and their successors shall be a body politic, with the style of the 'Trustees of the Indiana University,' in that name to sue and be sued, etc."

* * * * * * *

These legal rules laid down by the authorities from which we have quoted and stated the law as declared, are supported and adhered to by innumerable decisions of Courts of the highest standing, from which we might quote and extend this opinion to an unreasonable and unwarranted length, but we deem it unnecessary to do so. Under the rules stated, it is clear that the Indiana State Board of Agriculture is a private corporation; and *it matters not to what extent the State has voluntarily aided it by contributions and appropriations.*

* * * * * * *

State *vs.* Vicksburg, etc. R. Co., 51 Miss., 361.

"Neither of these institutions (the State Agricultural Colleges) are, in the legal sense, private corporations. *They did not have their origin in private or individual endowment,* but are sustained by public endowments and appropriations. The title to their property is in the State. They are public corporations, established and endowed by public authority and funds, and are controlled by Trustees appointed by the State for limited terms."

State *vs.* Irvine, 84 Pac., 105.

"The fact that, after the founding and establishment of a public State institution by legislative enactment, property may have been given, devised or bequeathed to it, or in trust for its benefit, has never been deemed sufficient to change the character of the institution, nor to deprive the Legislature of its plenary power of alteration, amendment, or even repeal of the Act. In such cases there is no contract relation between the State and the donor. Such donations must be presumed to have been made with knowledge of the public character of the institution and the power of the Legislature to control it.

University *vs.* Maultsby, 43 N. C., 257;
State *ex rel. vs.* Knowles, 16 Fla., 557;
Head *vs.* University, 47 Mo., 220;
Mead *vs.* Ballard, 7 Wall., 290;
19 L. Ed. 190."

The converse of this proposition is true. The Clemson Agricultural College was founded by private benevolence. The control is in a majority of the Board of Trustees desig-

nated by a private individual and made self-perpetuating. It is, therefore, in legal contemplation under the control of a private individual. The property is held in trust by the State of South Carolina in accordance with the will of Thomas G. Clemson. She could not sell it if she desired, nor use it otherwise than is provided in the will of Mr. Clemson. The State neither owns nor controls the institution. It is a private eleemosynary institution. This is, therefore, no suit against the State, and to sustain this judgment would be to deprive Plaintiff of his property without due process of law, in violation of the rights accorded to him by the Federal Constitution. The judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

JOS. A. McCULLOUGH,

Attorney for Plaintiff in Error.

FILED
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. [redacted]70.

DR. JOHN HOPKINS, PLAINTIFF IN ERROR,

vs.

THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

Brief of James P. Carey, Solicitor for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 257.

DR. JOHN HOPKINS, PLAINTIFF IN ERROR,

vs.

THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

Brief of James P. Carey, for Defendant in Error.

This is an action brought for damages against Clemson Agricultural College by the plaintiff who alleges that his lands on the west side of Seneca river have been damaged by the erection of a dike on the East side of said river on the farm belonging to the defendant and claims damages in the sum of eight thousand dollars. The defendant answered the complaint setting up that the farm and all property held by Clemson College was the property of the State of South Carolina and that all actions done with reference to said dike were done by the said State through its agents and employees duly authorized to do the same by the said State and that the Court had no jurisdiction in this action.

Counsel for the plaintiff and the defendant entered into a written agreement by the terms of which it is provided that the jurisdictional issue raised by the defendant shall be first determined and then the other features of the case shall be tried

unless the issue is finally disposed of. Under this agreement both sides offered such testimony as they desired relating to the jurisdictional issue.

It is contended by the defendant that this action is in effect a suit against the State and that the State not having consented thereto and being an indispensable party the Court has no jurisdiction to proceed with the action.

I see but two questions arising out of this issue: first, is this action a suit against the State? and second, has the State consented that such suit may be brought against it? As to the first question, it is now well settled that it is not necessary that the State should be a party upon the record in determining this question, but that a suit, though not in form, is in effect an action against the State in three cases. First, where the action is brought against the property of the State; and second, where the State has such an interest in the subject of the suit as to make it a necessary party; and third, where the property of the State would have to respond to any judgment which might be obtained in the action. If any one of these three things appear, the Court is without jurisdiction, and the action should be dismissed for want of jurisdiction. We contend in the present case that all three of these exist and that the Court is without jurisdiction.

This subject has been well considered by the Supreme Court of South Carolina, the leading case being that of Lowry vs. Thompson reported in 25 S. C., page 416. That was an action brought by James Lowry vs. Hugh S. Thompson, Governor, and W. E. Stony, Comptroller General and others as Commissioners of the Sinking Fund. The plaintiff had contracted to sell a tract of land to the State Land Commissioner, and accepted his deed therefor, which had never been delivered, but was taken possession of and retained by that officer. The office of Land Commissioner was abolished, and all of its assets directed to be turned over to the Secretary of State to be held subject to the control of the Sinking Fund Commission; and this deed thus came into the possession of the Secretary of State. The action was brought to recover possession of this deed.

By the Act of February 15, 1872, the office of Land Commissioner was abolished and the Act provided that all of the books and papers pertaining to the office of Land Commissioner be turned over to the Secretary of State and that the Secretary of State should execute the duties heretofore devolving upon the Land Commissioner. By the Act of 1878 the Secretary of State was required to take charge of all property of the State, the care and custody of which was not otherwise provided for by law, and to hold the same subject to the direction and instruction of the Commission of the Sinking Fund.

The foregoing is a brief statement of the facts of this case. Mr. Justice McIver in delivering the opinion of the Court reviewed all the authorities of the United States Supreme Court bearing upon the question, and after this review, proceeded to decide the real issue in the case in the following words:

"This action is not brought against the defendants as *individuals* for a tort, from which they are seeking to defend themselves by some act or order of the State government; but the action is brought against them as commissioners of the sinking fund to recover property alleged to be in their possession *officially*. Indeed, the person or officer, the Secretary of State, who, it is conceded, has the actual possession of the property, has not been made a party to the action, and the claim against the defendants as officers or agents of the State government is rested solely upon the ground that the Secretary of State, who has the actual possession of the property, holds it "subject to the directions and instructions of the commissioners of the sinking fund," who are therefore sued as the only parties having the right to control the disposition of the property in question.

Now, unless the property is held and claimed as the property of the State, it is manifest that the defendants, as commissioners of the sinking fund have nothing whatever to do with it, and never having had it in their actual possession, they would not, on that ground, be amenable to an action for its delivery. For the Act, Section 60 of the General Statutes only requires the Secretary of State to take

charge of "*the property of the State*" and to hold "*the same* subject to the direction and instructions of the commissioners of the sinking fund", and hence if the property in question is not held and claimed as the property of the State, then it is clear that the commissioners of the sinking fund have nothing more to do with it, and are under no more responsibility for it than for any other property of a third person which may happen either wrongfully or accidentally to be in the actual possession of the person who holds the office of Secretary of State. If then the property is to be regarded as in the official possession of the Secretary of State, held and claimed as the property of the State, and as such subject to the control of the commissioners of the sinking fund, it would seem to be clear that the action is, in fact, though not in form an action against the State itself; for in such case, as the State can only hold possession of personal property by or through an officer or agent the possession of the officer or agent is the possession of the State, and the State is an indispensable party to any contest for the right of possession.

Even if the possession of the State was originally acquired by some wrongful act of some one of its officers or agents, though it is difficult to see how this could be judicially determined until the question of jurisdiction is first disposed of, still no action could be maintained by the rightful owner to recover possession against an officer of the State government holding and claiming the property as the property of the State when sued as such; because in such case, the State being the real party in interest, would be an indespensable party to the action, and she could not be made a party without her consent, the action could not be maintained in any Court, and the claimant would be remitted to his remedy by petition to the Legislature, just as in the case of all other claims against the State, where, if his claim be well founded, it is not permissible to doubt he would receive ample justice. If, however, the action should be brought against the person in possession as *an individual*, and he, in his defence seeks to justify his possession by alleging title to, or right of possession in, the State, then, as in the case

of United States v. Lee, supra, he must establish such title or right of possession, and if he fails to do so, judgment goes against him *as an individual.*

The reason for the distinction is obvious. In the former case the party in possession being sued *as an officer*, judgment can only go against him as such, and not against him as an individual, for he is not sued as such; and as the only property which he holds as an officer is the property of the State, it is clear that the State is the real party in interest, as it is out of her property alone that the judgment sought to be recovered can be satisfied. But in the latter case, where the party in possession is sued as an individual, the judgment can only be enforced against the individual property of the defendant, and the State is not necessarily interested and is not therefore the real party in interest. Take this very case as an illustration. Suppose it should become necessary to enforce the alternative money decree, against whose property could it be enforced? Certainly not against the individual property as the persons named as the defendants, for no claim against them as individuals has been established. If it is proposed to enforce such judgment against the property held by them as commissioners of the sinking fund, the answer would be that all of the property so held is the property of the State, which, of course, even if the State enjoyed no more exemption from suit than a private citizen, could not be reached under such judgment, as she was not a party to the action in which the judgment was recovered, according to the only theory upon which the action could be maintained. True, it may be said that it is not likely that it will be necessary to enforce the alternative money decree; but that cannot affect the legal question involved. If the judgment is a valid one at all, it is just as valid in the one alternative as in the other; for if the Court had jurisdiction of the case, the judgment as rendered was not only authorized, but required by the conclusion as to the facts and the law reached by the Circuit Judge. It seems to us, therefore, that the fact that the judgment rendered in this case cannot in one of its alternatives, be enforced, because it goes against the

property of the State, shows conclusively that the action was in fact, though not in form, an action against the State, of which neither this Court nor the Court below has any jurisdiction."

Let us now run a parallel between this case and the case at bar. In the sinking fund case, the action was not brought against the defendants as individuals, but the action was brought against them as commissioners of the sinking fund, to recover property in their possession officially. In the present action, the action is not brought against the Trustees as individuals, for none of them are named. But the action is brought against Clemson Agricultural College, which is the same thing as an action against the Trustees as such. The Act of November 27, 1889, accepting the Clemson bequest, declares in Section 4, that the said *board of trustees is hereby declared to be a body politic*, under the name and style of Clemson Agricultural College of South Carolina. It was, therefore, the board of trustees which was declared to be a body politic, and corporate; and an action against the corporation, is, therefore an action against the board of trustees as such. It is clear, therefore, that this action is not brought against the trustees as individaals. but against them as trustees of Clemson Agricultural College, and, therefore, is brought in the same way as the case of Lowry vs. Thompson.

In the sinking fund case the office of land commissioner was abolished and the duties thereof devolved upon the Secretary of State who was to hold possession of the property, subject to the directions and instructions of the commissioners of the sinking fund. In the present case, the following may be taken as the undisputed facts: The first item of the will of Mr. Clemson, gives and devises the property therein named to the State of South Carolinia, whenever it signified its acceptance thereof; and directed his executor to execute a deed therefor, and turn the said property over to the State. The first section of the Act of the Legislature accepting the donation declares that the State of South Carolina accepts the devise and bequest, and authorizes the *State Treasurer* to receive and

safely hold the said property, both real and personal, as soon as the same is *conveyed* and *transferred to the State*. The Act then declares the College to be under the management of a board of trustees and provides that in no event shall dependent students be required to pay tuition, and that no student shall be required to pay tuition until the bequest shall have been exhausted under the terms of the will; and then provides that all property held by the board of trustees shall be held by them for the *purpose of the Act and held as the property of the State of South Carolina. The Act also provides, that it shall require two-thirds of the votes of the trustees to expend the State's funds, and requires them to make an annual report to the Legislature as to the condition of the property and the money expended.* On the 6th day of March, 1890, Richard W. Simpson, the Executor of the last will and testament of Thomas G. Clemson, conveyed *in fee simple to the State of South Carolina* eight hundred and fourteen acres of land and the *personal property* mentioned in the will of Thomas G. Clemson and turned the same over to the *State Treasurer*.

By a joint resolution of the Legislature, approved the 22 day of December, 1890, the *State Treasurer* was directed to safely *invest* and to *reinvest* the sums derived out of the Clemson bequest in such manner as he shall be directed by the *Governor* and *Comptroller General* and *Treasurer* or any two of them, and to pay the annual interest to the *board of trustees of Clemson College*. By a joint resolution approved January 4, 1894, the legislature authorized the board of trustees to purchase the Lee lands of two hundred and eighty-eight acres adjoining the other tract, for ten thousand dollars and pay for the same. On the 25th day of May, 1894, a deed was made for this land by Floride Isabella Lee. There is one other small tract of land of fourteen acres purchased and paid for by the State and deeded to the College by Anna P. Lewis the price thereof being four hundred and twenty dollars and the date of the deed is the 30th day of June, 1893. On the 23rd day of December, 1889, the Legislature passed an Act providing for the building and maintainance of Clemson College and vesting the *Hatch* and *land-*

script funds in the six *State* trustees; and what is known as the *Morrill* fund also. The only other source of income of the College is the fertilizer tax. This tax is paid to the *State Treasurer* subject to the order of the trustees. The Act of December 24th, 1890, so provides, and all monies appropriated to public institutions are paid by the State Treasurer; Section 724, Code of 1902, Volume I. The dike in question was built on the eight hundred and fourteen acre tract of land conveyed to the *State*. By a joint resolution approved January 1st, 1894, the board of directors of the *South Carolina Penitentiary* were *authorized* and *required* under the order of the board of trustees to furnish convicts to the board of trustees and provided that fifty convicts be employed by said trustees in *diking Seneca river*. On April 20, 1894. *W. A. Neel*, then *Superintendent of the Penitentiary*, appeared before the board of trustees and requested these convicts; and the board then passed a resolution to turn over said *convicts to him*, whenever the board of *directors of the penitentiary shall agree to the proposition to furnish sufficient convict labor to do the work of building the dike, necessary to protect the bottom of Clemson College, without expense to the College except they agreed to feed the said convicts while engaged in the construction of said dike*. The College is not a business corporation in any sense of the word. No capital stock has ever been fixed. No stock was ever issued, and there is no person whatever claiming any interest in any of its property, but it is conceded to be the property of the State. No taxes are paid on any of it. No returns are made. No money is expended except as directed by the *Legislature*, and every officer connected with it is an officer and agent of the *State*. In other words, the College is the *State's* institution, *built, supported* and *maintained* by the *State* itself, for the education of the young men of the State, and education there is made so cheap, that any youth desiring an education can procure it at Clemson College. Every cent of money expended must be authorized by the *State*, and a *report thereof* must be made to the *General Assembly of the State*.

From this statement of facts, it can readily be seen how much stronger this case is than the sinking fund case. In the

sinking fund case, the Supreme Court held, that the property must be regarded as in the *official possession* of the *Secretary* of *State*, *held* and claimed as the property of the *State*; and as such, *subject to the control of the commissioners of the sinking fund*, and that the action was in *fact*, though not in *form*, an action against the *State itself*, for the *State* can only hold *possession* of *property* by or through an officer or agent, and the possession of the *officer* or *agent* is the possession of the *State*. The case goes so far as to hold that even if the possession of the State was originally acquired by the wrongful act of some officer or agent, still no action could be maintained by the rightful owner to recover possession against an officer of the *State* government, holding and claiming the property as the property of the *State* when sued as such; because in such case the State being the real party in interest, would be an indispensable party to the action, and as she could not be made a party without her consent, the action could not be maintained in any Court, and the claimant would be remitted to his remedy by petition to the Legislature, just as in the case of all other claims against the State, where, if his claim be well founded, it is not permissible to doubt he would receive ample justice. The two cases show, that the property which is the subject of the suits is the *State's* property, and that the state is a necessary party in both cases. The sinking fund case expressly declares, that should it become necessary to enforce a money decree, it would have to be enforced against the State's property, and that if it was attempted to enforce such judgment against the property held by the sinking fund commissioners, the answer would be, *that all of the property so held, is the property of the State, and as the State's property would have to respond to such judgment* if paid at all, the suit would be in *effect against the State* and should be dismissed for want of jurisdiction.

The sinking fund case was afterwards reviewed in the case of The Columbia Water and Power Company vs. The Columbia Electric Company, reported in 43 S. C., page 154. In this case, the State owned the property known as the Columbia Canal, and transferred the same to trustees, reserving for the

use of the State five hundred horse power of water power, and authorized the trustees to make sale of the property, subject to the reserved right. The trustees made such sale of the property; and afterwards the State leased the five hundred horse power under a contract which required the defendant to furnish the penitentiary with electric power for its purposes. The defendant constructed its works, and put up a supplemental steam plant on the adjoining lands, on the bank of the canal. Action was brought against the defendant to enjoin any use of the water power other than that supplied to the State institution, and to recover damages for the erection of the steam plant on plaintiff's property. *It was held that the State was an indispensable party so far as the case involved an equity issue of an injunction*, and the case on the equity side of the Court should be dismissed for want of jurisdiction.

In the case of Bank vs. The State, reported in 60 S. C., page 474, our own Court used this language, "Whenever the United States Supreme Court, notwithstanding the inhibition of suits against the State without its consent, rightfully assumes jurisdiction of a suit on account of action on the part of an officer, *it is upon the ground that the officer's action is not the State's action*, but the individual act of the person holding the office, in case where the officer's act is not authorized by valid and constitutional statute. *If authorized by valid law, the officer's act is the act of the State, if not so authorized, the officer's act is his own.*"

These three cases it seems to me, settle beyond all question, that the present case is in effect a suit against the State of South Carolina. The subject of the suit, and all of the property of the defendant, belongs to the State. The diking of Seneca river was authorized by the State, and the work was done by an officer of the State, by the State convicts, and if any judgment should be obtained in this case, it could only go against the property of the State. This being true, the defendant's jurisdictional point is well taken, and the complaint should be dismissed.

Does it make any difference that the board of trustees is

declared to be a body corporate? I can see no reason why this should make any difference. The College is the State's institution, built on the lands belonging to the State, supported and maintained by the State, owns no property of its own whatever, has no stock; pays no taxes, and is, therefore, nothing more than an *agency* of the *State* by which it conducts an educational institution. The case of *Danby vs. The State Bank*, reported in 3 S. C., page 124, can have no application, because in that very case, the Court held that the State Bank was a *business corporation*, and the State had pledged *its good faith for its debts, and by an Act of the Legislature had guaranteed its losses*. The Court further held that the action was not a suit against the State, *because of the existence of stockholders*, the State holding a certificate of stock issued by the bank, and that an action against the corporation was not an action against the *stockholders* thereof, and that the *property of a stokholder* could not be reached by an action against a corporation in which he held the *stock*. The will of Mr. Clemson, and all of the Acts of the Legislature, show conclusively that Clemson College was never intended to be a business corporation; that no stock was ever contemplated; and that it has none of the features of a business corporation, but is purely and simply a *governmental agency of the State*, through which it is furthering and carrying out the scheme of education declared in the Acts of the Legislature with reference to Clemson College. I find a Kentucky case almost exactly like the case at bar, and I quote the case in full here: *Williamson v. School*, 95 Ky. 251. 44 Amer. St. Rep. 243.

"The appellee, the Louisville Industrial School of Reform, was created a body corporate by an act of the General Assembly in 1854, under the name of the Louisville House of Refuge. Its object and business was to take charge of such youths as might be committed to it, and care for their moral and physical training and education. It was a charity, and its purposes was reformation, by training its inmates to habits of industry and by instilling into their minds the principles of right living, to

the end that they might become useful citizens of the State, rather than fill its prisons and poor houses.

The *incorporators* and their *successors* are under the control and oversight of the *Legislature*, and are mere *instrumentalities* of the *commonwealth*. The State interposed in behalf of neglected and abandoned children within its confines in its capacity of parens patriae, and assumed the guardianship of such children as were committed to the institution. It was an *agency of the State*, and maintained by *taxation and State aid*.

The appellant, a boy ten years of age, was committed to the care, control, and restraint of the institution, and his petition brought by his next friend, Thomas, alleges that without fault on his part one of the servants and employees of the apellees, and known by it to be incompetent and unfit for such service, struck and beat the appellant in such cruel and inhuman manner that he was caused great suffering in mind and body, and was permanently injured and damaged, etc.

To his petition, a general demurrer was sustained and the petition dismissed. The correctness of this judgment is the question on this appeal, and while it has been determined directly, the general principles are well established. The functions of the institution are *governmental* As said in Farman v. Pierce, 144, Mass. 203, 55 Am. Rep. 452: "It is a provision by the *commonwealth*, as parens patriae, for the custody and care of neglected children, and is intended only to supply to them that *parental custody* which they have lost.

In Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep, 499, it was held that an action does not lie against a *State house of Refuge* for an assault made on an inmate by an officer thereof. It is there said: "Youths in whom the seeds of vice have already germinated, are placed there under proper restraint, so that the growth of crime may be arrested or eradicated in its incipiency. Funds are contributed by individuals impelled by philanthropic motives, and *donations* are obtained from municipal and *state treasuries*. These are the funds of the *institution, controlled by the managers, not for their own profit or*

benefit, but solely for the *charitable purpose desigined by its organic law.* Several of the most eminent Judges in England expressed themselves with much emphasis in opposition to an allowance of damages out of a fund so held by *fiduciary agents;*" and the principle determined in a number of English cases that "damages are to be paid out of the pocket of the wrongdoer, and not from from the *trust fund,*" was approved.

It is contended that these cases followed the old decisions in England, and that the latter have been since overruled. Be this as it may, the principle announced seems entirely just and reasonable. *If the funds of these institution are to be divested from their intended beneficent purposes by lawsuits and judgment for damages for negligence, or malicious servants, their usefulness —indeed their existence—will soon be a thing of the past.*

The judgment dismissing the petition is afirmed."

It will be seen that these cases settled, that the functions of such and institution as Clemson College are *governmental*, and that the act of the *Legistature* simply provides for the custody, care and education of the children of the State, and that damages cannot be taken from such a sacred trust fund without the *express consent of the State.*

In the New York case of Brown vs. The People, 75 New York 441, the Court said "the duty of providing for criminals is inherent in the Sovereign power, it may be committed to agency selected for that purpose, but such agency while engaged in that duty stands so far in the place of the *State and exercises it political authority, and do not act in a private capacity. It is so in laying out and maintaining highways, the building of Court Houses and school houses, as well as in the building of jails and places of detention.* In the performance of all such duties, it is settled by the unanimous agreement of the Courts, that these *agencies are not liable for neglect or misfeasance, unless the liability is especially given by statute. It is not necessary to discuss the reason of this rule, for there is no break in the long line of authorities by which it is established.* See also Overhoser vs. National Home for Disabled Soldiers, 96

Amer. St. Rep., 658. U. S. vs. Kirkpatrick, 9 Wheat., 720, Beers vs. State, 20 How., 527.

This brings us to the second question asked at the beginning of this argument: "Has the State consented to a suit of this character being brought against it?" It is well settled that a State cannot be sued without its consent. It is well settled that this consent must be express and unequivocal. It is well setted that he who alleges consent on the part of the State must bring himself within the expressed consent given by the Legislature of the State. The State is a Sovereignty, and anything which is not expressly given is expressly withheld. Can it be contended that the State has authorized a suit of this character? By the Act accepting the Clemson bequest, section one declares the power of the board of trustees to be to organize the College, and put it in operation, prescribe the course of study, elect the professors, make rules and regulations for the government of the College, employ superintendents, workmen, laborers for the farm, shops and ground, as may be necesssary, and fix their compensation. Section 4, provides, that they may contract for purchase, and hold property for the *purpose of the Act, and may take any property given or conveyed, deeded, devised or bequeathed to said College, and hold the same for its uses, and benefits, and shall incur no obligation on the part of of the State connected with such gifts or conveyances.* That they shall invest all funds which may come into their possession and reinvest the same in such way as they deem best for the interest of the College. After enumerating these powers, section 4 uses these words "They may be sue and be sued, plead and be impleaded, in their corporate name, *and may do all things necessary to carry out the provisions of this Act.*" It is clear that the sue and be sued, contemplated in this statute, relates to such powers as were conferred upon the trustees by the Act, and the Legislature did not mean to throw the State open to any and *all kinds of suits.* This could not have been done except by express statute, and we submit the proper construction of the limitation of the suits herein allowed, was that the trustees might sue and be sued only so far as it was necessary

to carry out the powers conferred upon them, and upon such contracts and obligations as they might make in *pursuance of such power*. It can't possibly be successfully contended that this authority authorizes a suit of the character which is being brought by the plaintiff in this case. The plaintiff is *suing for a tort*, and in order to maintain such a suit against the State, it is incumbent upon him to point out an express statute, *authorizing in unmistakable terms, suits against it for torts committed by its agents and officers*. There is no pretension that there is such a statute in this case. Do the authorities show this position to be correct? On page 487, 26 American and English Encyclopedia of Law, the rule is laid down in these words: "An act authorizing suits against the State, being in derogation of its sovereignty, must be construed *strictly*, and the consent must be in clear and unambiguous terms, for to compel a State upon the theory of *doubtful* statutory interpretation to appear as defendant suitor in its own Courts, and to litigate with private parties, as to whether it has *abrogated its sovereignty*, or its right of *exemption from suits* would be intolerable. Thus, the privilege must be confined to those whom it is clearly intended should enjoy it, *and to such claims as are clearly comprehended by the act*". In the notes, the Author refers to the following cases, a suit for specific performance is not included in the cases in which consent to suit has been given.

The statute authorizing suits against the State, do not include a demand, based upon the unlawful and tortuous acts of State officers, but relates to *claims, which if valid, renders the State a debtor to the claimant*. And on page 480, the same author states the rule thus: "The *State* is not *liable for the torts* of its officers, though committed in the discharge of official duties. The exemption of the State from liability for the torts of its officers, does not depend upon its immunity from suits *without its consent, but rests upon the ground of public policy*, which forbids that any such *liability should ever arise*, and a demand for damages resulting from such torts, *is not a claim agains the State*, within a constitutional and statutory provis-

ion conferring jurisdiction upon the Courts to *adjudicate claims against the State.*" The Statutes of the United States go further and give the right to sue the government in more cases than any State in the Union, but even in that Court, it is expressly held, that the United States have not consented to be liable for *suits founded in torts for wrongs done by their officers, though in the discharge of their official duties.* All of the cases in the Federal Court on this subject will be found collected in the case of Belknap vs. Schild, 161 U. S. page 10. There is another line of cases which sustains the contention we here make, that the words in the charter, "sue and be sued," only allow the trustees to sue and be sued under the power conferred upon them in the charter, and does not throw them open to general suits. The case of Witter vs. Mission School District, 66 American State Reports, page 33. It is there held, that the State is not bound by the *general words* in a statute which would operate to intrench upon its sovereign rights, and injuriously affect its capacity to perform its functions, *or to establish a right of action against it.* It was there held the word "*any building*" in the mechanics' lien law, did not include property belonging to the *State*, and that the word "persons" did not include a school committee, and authorize it to be sued ; and that laws made primarily to provide for individual rights will not be presumed to include the *Staie, when the effect might be to authorize a suit against the State.* This case examines many authorities sustaining the position that general words in a statute cannot be construed into specific consent to be sued on the part of the State.

We, therefore, maintain under this branch of the case, first, that the words "sue and be sued," in the Act accepting the Clemson bequest, must be interpreted to mean that the trustees might sue and be sued upon such *contracts* and *obligations* as they have authority to make under the power conferred upon them ; and second, that in no event can such words be construed as consent on the part of the State that an action growing out of a *tort* might be brought against the State of South Carolina.

The foregoing is the argument used by me before the Supreme Court of South Carolina. That Court held that the suit was an action against the State in tort, that the State was an indispensable party to the equity cause of action and that the State had not given its consent to be sued, (Record 144). Under agreement between counsel the only question which has been determined is the jurisdictional one raised by the answer of the defendant that the suit was in effect one against the State and that it was a necessary party to its determination, (Record 114). The action is of a two-fold character, to recover damages in tort on the law side of the Court and to abate the dike on the equity side. The Court held that the action on the law side of the Court could not be maintained because it was in effect a suit against the State, and for the further reason that Clemson College was a public corporation and could not be made liable in tort, there being no Statute authorizing such suit. It further held that the words "sue and be sued" contained in the charter of the College could not operate as consent to be sued in such action. The Court held that the cause of action on the equity side could not be maintained because the State was a necessary party and could not be made such without its consent which had not been given.

The decision of the South Carolina Supreme Court construing the charter of the College and the different acts of the Legislature relating to the subject and the local laws of the State is binding here. That Clemson College is a public corporation, is the agent of the State to hold its property, is not liable in tort and that the words "sue and be sued" in its charter do not authorize a suit in tort are questions that need not be argued. In the case of Smith et al. vs. Kernochen, 7 Howard, 199, this Court says: "It belongs to the State Courts to expound their own statutes and when thus expounded the decision is the rule of this Court in all cases depending upon the local laws of the State." This principle is true both as to the powers and liabilities of corporations created by State statutes. City of Detroit vs. Osborne, 135 U. S., 492. The decision on the main question that the suit was one against the State, and that the

State was a necessary party is in harmony with the decisions of this Court.

In the case of Belknap vs. Schild, 161 U. S., 10, this Court announces the same doctrine as to liability of the Government for torts as that held by the South Carolina Supreme Court. It is there said: "But the United States have not consented to be liable to suits, founded in tort, for wrongs done by their officers, though in the discharge of their official duties. The United States, therefore, are not liable to a suit for an infringement of a patent, that being an action sounding in tort." In this case an injunction was sought against infringement of a patent by the use of a caisson gate which is the part of a dry dock in a navy yard, put in place by and the property of the United States. It was held that an injunction could not be granted in an action against officers and agents of the government, as they had no individual interest in the controversy, but the relief asked was in fact against the United States. The Court said: "The caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the United States and held and used by the United States for the public benefit.

If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States then had both the title and possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction and for the destruction of the gate in question, the defendants had no individual interest in the controversy: the entire interest adverse to the plaintiff was the interest of the United States in the property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiffs sought to control the defendants in their

official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare; and therefore, the United States were an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought, and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this Court herein cited." In the same case it is said: "But no injunction can be issued against officers of a State, to restrain or control the use of property already in the possession of the State, or money in its treasury when the suit is commenced; or to compel the State to perform its obligations; or where the State has otherwise such an interest in the object of the suit as to be a necessary party."

In the case of Minnesota vs. Hitchcock, 185 U. S., 373, this Court said: "The legal title to these lands is in the United States, the officers named as defendants have no interest in the lands or the proceeds thereof. The United States has proposed to sell them; this suit seeks to restrain the United States from such sale, to divest the government of this title and vest it in the State. The United States is, therefore, the real party affected by the judgment, and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined not by the fact of the party named as defendants on the record, but by the result of the judgment or decree which may be rendered, the same rule must apply to the United States." In the recent case of Murry vs. Wilson Distilling Co., 213 U. S., 150, it was held that the winding up commission, as individuals had no interest in the funds in their hands, but held the same as the agents of the State, and that the commission was a governmental agency of the State and consequently the suit was one against the State.

There is another reason why plaintiff in error must fail in his contention that the decision of the South Carolina Supreme Court deprives him of a federal right. That Court decided

upon an independent ground that the defendant was not liable. It held that the defendant was a public corporation and could not be sued in tort there being no statute allowing such suit. In Rutland R. Co. vs. Central Vermont R. Co., 159 U. S., this Court says: "It is well settled by a long series of decisions of this Court, that where the highest Court of a State, in rendering judgment, decides a federal question, and also decides against the plaintiff in error upon an independent ground not involved in a Federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question."

There is still another reason why this writ of error should fail. It is difficult to see how either Section 2 of Article III, of the Constitution of the United States or the Eleventh amendment has any application to the inquiry whether a suit by a citizen of a State in its own Courts is a suit against that State. That seems to be purely a question of local law to be determined by the State Court. In the case of Curran vs. Arkansas, 15 How. 302, this Court says: "That the State of Arkansas is capable of being thus sued, has been decided, after careful examination by the Supreme Court of that State, in this suit; and as this is purely a question of local law, depending on the constitution and statutes of the State, we follow that decision, and hold in conformity therewith, that by its own consent the State has become liable to a decree in favor of the complainant in this suit; if the complainant has valid grounds entitling him to the relief prayed."

Taking private property without compensation and without due process of law.

It is contended by the plaintiff in error that the Federal questions of taking private property for public use without just compensation and without due process of law arise in this case. We fail to see that they do. In the first place, the only issue determined by the South Carolina Supreme Court was the jurisdictional one whether the suit was one against the State under an agreement between counsel for the plaintiff and defendant. This agreement was in the following words and is set out on

page 114 of the record: "It is hereby agreed that the jurisdictional issue raised by the defendant shall be first determined, and that either party may offer such testimony on this issue as they may desire before the Circuit Judge, who shall decide said issue, from whose decision either party may appeal to the Supreme Court, and the other features of the case are not to be heard until this issue is finally disposed of." Here is an express agreement to try only the jurisdictional issue and providing that no other question shall be tried till it is disposed of. Consequently no other question has been passed upon by either the Circuit or the Supreme Court of South Carolina and we contend that this Court will not pass upon questions other than the one passed upon by the South Carolina Courts. In the face of this agreement and the decisions of the South Carolina Courts it is now sought to have this Court declare the joint resolution of the South Carolina Legislature providing that fifty convicts shall be furnished the Board of Trustees of Clemson College to be used in diking Seneca River on the College Farm contrary to the provisions of the Federal Constitution relating to the taking of property for public use and without due process of law. The rule is well established in South Carolina that the Supreme Court will not pass upon a constitutional question unless it is made and ruling requested on Circuit. Rippy vs. So. Ry., 80 S. C. 539. The constitutionality of a statute not raised on Circuit will not be considered although raised by exception and argued. Fleishman v. So. Ry., 76 S. C. 237. The question now sought to be raised was neither made nor decided by the Supreme Court of South Carolina. The final decree of a State Court may be re-examined here where there is drawn in question the validity of a State statute on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity. Columbia Water Power Co. vs. Columbia Electric Street R. L. & P. Co., 172 U. S. 476.

In this case the Court says: "But where the validity of a treaty or statute of the United States is raised and the decision is against it, or the validity of a State statute is drawn in question and the decision is in favor of its validity, this Court has

repeatedly held, that if the Federal question appears in the record and was decided or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here."

In the case of Scudder vs. Coler, 175 U. S. 33, the Court says: "In order to give this Court jurisdiction of a writ of error to review a judgment which the highest Court of a State has rendered in favor of the validity of a statute or of an authority exercised under a State, the validity of the Statute or authority must have been drawn in question on the ground of their being repugnant to the Constitution, laws or treaties of the United States. When no such ground has been presented to or considered by the Courts of a State, it cannot be said that those Courts have disregarded the Constitution of the United States, and this Court has no jurisdiction."

The plaintiff in error is therefore in no position to have the question of the "taking" or "deprivation" of property considered here. The South Carolina Courts passed upon neither. They passed only upon the quustion whether the suit was one against the State and that under an agreement that no other question was before them. In the next place, the diking of a river on one's own plantation is not a taking or deprivation of property. The provision in the fifth amendment to the Constition of the United States that "private property shall not be taken for public use without just compensation" is a limitation upon the powers of the Federal government and not upon the States. This amendment need not therefore be considered. The fourteenth amendment provides that no State shall "deprive any person of life, liberty or property without due process of law." Can it be said that the State of South Carolina by passing an act to dike and protect its own farm contemplated depriving a person living on the other side of the river of his property? The question of deprivation of property is not involved here. It is excluded by the agreement entered into as to the issue tried. Besides, overflowing the lands of another is

neither a taking or deprivation unless there is a physical invasion of the property and an ouster of possession. It is denied by the defendant that this dike has caused any overflow of or damages to the property of the plaintiff in error. This is a question of fact to be determined if appropriate proceedings are instituted to raise the issue. This fact has not been determined and could not be under the agreement. The defendant in error submitted no evidence upon the question. In the case of Northern Transportation Co. vs. Chicago, 99 U. S. page 635, the Court uses this language: "It is the prerogative of the State to be exempt from coercion by suit, except by its own consent." "This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the Legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the Constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents or give him any right of action. This is supported by an immense weight of authority. The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly vs. Green Bay Co., 13 Wall 166, and in Eaton vs. R. R. Co., 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a "taking."

In those cases there was a physical invasion of the real estate of the private owner and a practical ouster of his possession." See also the case of Manigault vs. Springs, 199 U. S., 473. It is there held that the flooding of lands consequent

upon the private erection of a dam under the authority of legislation enacted in the exercise of the police power to submerge the drainage of low lands does not amount to a taking which requires compensation to be made to the owner in order to afford the due process of law guaranteed by United States Constitution, fourteenth amendment, when such flooding can be prevented by raising the height of the dikes around the lands. In the case of Gibson vs. The United States, 166 U. S., 269, it was decided that where by the construction of a dike by the United States in the improvement of the Ohio River the plaintiff, a riparian owner, was through the greater part of the gardening season deprived of the use of her landing for the shipment of products from and supplies to her farm, whereby the value of her farm was reduced $150 to $200 per acre, there was no taking of the property, but only a consequential injury. In the case of Bedford vs. United States, 192 U. S., 218, the Court in referring to the Green Bay case and the Lynah case says: "In both cases, therefore, it was said that there was an actual invasion and appropriation of land as distinguished from consequential damages. In the case at bar the damages was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the Lynah case in the cause and manner of the injury. In the Lynah case the works were constructed in the bed of the river, obstructed the natural flow of the water, and were held to have caused, as a direct consequence, the overflow of Lynah plantation. In the case at bar the works were constructed along the banks of the river, and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with the natural conditions. Therefore, the damage to appellant's land, if it can be assigned to the works at all, was but an incidental consequence of them." It was held that there was no taking of property. The foregoing are the leading cases of this Court on the subject of "taking or deprivation" of property by flooding lands.

The defendant submits that the assignment of errors that that plaintiff's property has been taken without compensation or that he has been deprived of the same without due process of law cannot prevail.

JAMES P. CAREY,

HOPKINS *v.* CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 70. Submitted December 7, 1910; ordered for reargument January 30, 1911; resubmitted March 15, 1911.—Decided May 29, 1911.

With the exception named in the constitution every State has absolute immunity from suit; and the Eleventh Amendment applies not only where the State is actually named as a party but where the suit is really against it although nominally against one of its officers.

Immunity from suit is a high attribute of soveriegnty and a prerogative of the State itself which cannot be availed of by public agents when sued for their own torts.

Neither a State nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator; in such a case the law of agency has no application and the individual is liable to suit and injunction.

While the State as a sovereign is not subject to suit, cannot be enjoined, and the State's officers cannot be restrained from enforcing the State's laws or held liable for consequences of obedience thereto, a void law is neither a law or command but a nullity conferring no authority and affording no protection or immunity from suit.

Neither public corporations nor political subdivisions are clothed with the immunity from suit which belongs to the State alone; and while they may be relieved from responsibility to a wider degree than individuals would be they must make the defense and cannot rely on immunity.

In this case *held* that an agricultural college corporation was not such an agent of the State as to be immune under the Eleventh Amendment from suit for damages caused by erection of a dyke and consequent overflow of plaintiff's property; but also held that as the dyke was on property belonging to the State, the State would be a necessary party to the suit in order to decree removal, and in the absence of consent to be sued the court had no jurisdiction to decree removal.

Although parties erecting a dyke on property belonging to the State

may not, under the Eleventh Amendment, be immune from suit, the State is a necessary party to a suit to remove the dyke and it is beyond the jurisdiction of the court to make a decree to that effect.

Where a suit is for damages caused by erection of a dyke and for removal of the dyke the prayer for removal can be stricken out without depriving the court of jurisdiction to hear and determine the prayer for damages.

77 So. Car. 12, reversed.

In his complaint the plaintiff alleged that he owned a valuable body of fertile bottom lands, on the west side of the Seneca River, on which he had raised large crops from the time of purchasing the farm in 1880 until 1895, when the defendant, by its trustees, erected and maintained a high embankment on the eastern side of the river. This dyke was to protect the lands of the college from overflow, but its construction so narrowed the channel of the river that it caused the rapid current of the stream in time of high water to flow across the lands of plaintiff, whereby the natural bank had been destroyed, the rich soil had been washed away, and his property practically ruined for agricultural purposes, and "during the period aforesaid said injury has been and still is continuous from day to day and year to year." He prayed for judgment for $8,000; that the defendant be required to abate and remove the dyke and restore the condition prevailing prior to its construction and for general relief.

The defendant denied all the allegations of the complaint and alleged that the College had no title to the land, or any other property in connection with the establishment and maintenance of the institution; that the construction of the dyke was authorized by the State and had been built by the College, as a public agent, on land the title and possession of which was in the State. It therefore prayed that the complaint be dismissed.

By stipulation the case was heard solely on the question of jurisdiction. Evidence was introduced showing that

by his will, probated April 20, 1888, Thomas G. Clemson left personal property and the "Fort Hill" place, consisting of 814 acres, providing that whenever the State of South Carolina should accept the property for the purpose of founding an agricultural college, his executor should convey it to the State, to be held so long as it in good faith devoted the property to the purposes of the donation —such College to be governed by a board of trustees, which should never be increased to more than thirteen. Seven trustees named by the testator, and their successors, were to have the right to fill vacancies in their number, but the legislature might elect six other trustees.

On November 27, 1889, the State accepted the Clemson bequest, subject to the terms set forth in the will and enacted that upon the transfer of the property to the State by the executor a college should be established in connection with the devise, to be styled the Clemson Agricultural College of South Carolina, to be situated at Fort Hill, on the plantation so devised, in which should be taught all branches of study relating to agriculture, the College to be under the management of a board of thirteen trustees, composed of the seven nominated by the will and their successors and six members elected by the legislature.

Sec. 4 of the charter provided:

"That the said Board of Trustees is hereby declared to be a body politic and corporate, under the name and style of the Clemson Agricultural College of South Carolina. They shall have a corporate seal, which they may change at their discretion; and in their corporate name they may contract for, purchase and hold property, for the purpose of this act, and may take any property or money conveyed by deed, devise or bequest to said college, and may hold the same for its use and benefit; Provided that the conditions of such gift or conveyance shall in no case be inconsistent with the purposes of this act,

and shall incur no obligation on the part of the State. They shall securely invest all funds and keep all property which may come into their possession, and may sell any of the personal property not subject to trust, and reinvest the same in such way as they may deem best for the interest of said college. They may sue and be sued, plead and be impleaded, in their corporate name, and may do all things necessary to carry out the provisions of this act, and may make by-laws for this purpose if they deem it necessary."

By the act of January 4, 1894, it was declared that fifty convicts might *be employed by the Trustees of Clemson College in dyking Seneca River, adjoining the college farm, and such other work as the Trustees deem useful, for twelve months.*

In April, 1894, a resolution was passed by the Board of Trustees concerning the work of "building the dykes necessary to protect the bottom lands of Clemson College." It does not appear when this work began or was finished, but various extracts from the minutes of the trustees, from April, 1894, to July, 1905, were introduced in evidence from which it appeared that the dyke was constructed according to plans and specifications approved by the board, under the direction of engineers selected by the board, and that payments were made by it on account of work thereon. The embankment was either wholly or partially washed away, and, in 1903, a resolution was adopted by the board "to have a survey made of the dyke for the purpose of submitting estimates of the work necessary to be done to afford protection to the bottom lands on the college property—the cost of the estimate to be based on the recent flood."

Evidence was introduced as to the property owned by the College and the sources of its income, from which it appeared that a tract of land, partially paid for by the State, had been conveyed to the College in fee simple, and

other land had been conveyed for college purposes. The State appropriated more than $100,000 per annum, which, with the interest on the securities passing under the residuary clause of Dr. Clemson's will, constituted the main source of income, though the College did receive about $6,500 per annum from tuition, rent, sale of dairy products and the proceeds derived from the electric plant and textile department.

There is copied in the record the act of 1894 to incorporate Clemson College for the purpose of police regulation over the territory within five miles of the college building.

The trial court found that the current expenses were paid out of interest on the donation and from the annual appropriations by the State; that the College had no property which could be sold under execution; that the title to the land on which the dyke was erected was in the State. Referring also to the Act of 1894, conferring municipal powers on Clemson College, the court held that the defendant was a public agent, which could not be sued without the consent of the State; that such consent was not given by the provision of the charter that the trustees "might sue and be sued, plead and be impleaded in their corporate capacity," inasmuch as that related to contracts made for College purposes and did not warrant suits against a public agent for a tort. Holding that the State was an indispensable party, and had not given its consent to be sued, the court dismissed the complaint.

On the appeal the plaintiff in his assignments of error contended that the title to the land was in the State only as trustee; that the college was not a public corporation, but a private educational institution, without governmental powers; that it had not been established or endowed by the State and was not governed by the State or solely by trustees appointed by the State (4 Wheat. 634); that in addition to the equitable ownership of the Fort

Hill place, it owned certain lands in fee simple, which were subject to levy and sale and that the corporation was liable for its own torts.

The twenty-third assignment of error was as follows:

"Because the Fourteenth Amendment to the Constitution of the United States provides: 'Nor shall any State deprive any person of life, liberty or property without due process of law.' The allegations of the complaint show that plaintiff has been deprived of his property for all practical purposes as agricultural lands as effectually as if there had been a physical taking thereof; that plaintiff has thus been deprived of his property by the defendant corporation, acting by and through its board of trustees, and this constitutional guarantee has been violated by such action, whether taken pursuant to an act of the legislature or otherwise, and his honor erred in not so holding."

The Supreme Court of the State adopted the opinion of the trial judge, and on the ground that the State was a necessary party and had not consented to be sued, dismissed the bill of complaint. 77 S. Car. 12; 57 S. E. Rep. 551. Thereupon the plaintiff sued out a writ of error to this court:

Mr. Joseph A. McCullough and *Mr. R. T. Jaynes* for plaintiff in error.

Mr. J. P. Carey for defendant in error.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

The plaintiff sued the Clemson Agricultural College of South Carolina, for damages to his farm, resulting from the College having built a dyke which forced the waters of the Seneca River across his land, whereby the soil had

been washed away and the land ruined for agricultural purposes. There was no demurrer, but the defendant filed what was treated as a plea to the jurisdiction in which it averred that it owned no property, and had constructed the dyke as a public agent only, by authority of the State, on land belonging to the State. By stipulation the hearing was confined solely to the question of jurisdiction, and after considering the evidence the complaint was dismissed.

That ruling and the assignments of error thereon raise the question as to whether a public corporation can avail itself of the State's immunity from suit, in a proceeding against it for so managing the land of the State as to damage or take private property without due process of law.

With the exception named in the Constitution, every State has absolute immunity from suit. Without its consent it cannot be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the Eleventh Amendment has been held to apply, not only where the State is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the State, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; or to pay out its money in his possession on the State's obligations; or to execute a contract, or to do any affirmative act which affects the State's political or property rights. *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446; *North Carolina* v. *Temple*, 134 U. S. 22; *Louisiana* v. *Steele*, 134 U. S. 230; *Louisiana* v. *Jumel*, 107 U. S. 711; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *In re Ayers*, 123 U. S. 443; *Hans* v. *Louisiana*, 134 U. S. 1; *Harkrader* v. *Wadley*, 172 U. S. 148; *Hagood* v. *Southern*, 117 U. S. 52, 70.

But immunity from suit is a high attribute of sover-

eignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. For how "can the principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual defendants . . . whenever they interpose the shield of the State. . . . The whole frame and scheme of the political institutions of this country, state and Federal, protest" against extending to any agent the sovereign's exemption from legal process. *Poindexter* v. *Greenhow*, 114 U. S. 270, 291.

The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the State, they—though not exempt from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446, 452. But if it appeared that they proceeded under an unconstitutional statute their justification failed and their claim of immunity disappeared on the production of the void statute. Besides, neither a State nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury.

Consequently there have been recoveries in ejectment

where the public agent in possession defended under a void title of the Government. *United States* v. *Lee*, 106 U. S. 196; *Tindal* v. *Wesley*, 167 U. S. 204. A suit against a bank was sustained even though the State held part of the stock, *Bank of U. S.* v. *Planters' Bank of Georgia*, 9 Wheat. 904. A tax collector was enjoined, where, under an unconstitutional law, he was about to sell the property of the taxpayer, *Poindexter* v. *Greenhow*, 114 U. S. 270. An attorney general was restrained from suing to recover penalties imposed by an unconstitutional statute, *Ex parte Young*, 209 U. S. 123. Commissions have been enjoined from enforcing confiscatory rates, *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Proutt* v. *Starr*, 188 U. S. 537. A state land commissioner was enjoined from proceeding, under an unconstitutional act, to cause irreparable damage to defendant's property rights, *Pennoyer* v. *McConnaughy*, 140 U. S. 1. Commissions have been restrained from enforcing a statute which illegally burdened interstate commerce, *McNeill* v. *Southern Ry.*, 202 U. S. 543; *Railway Commission* v. *Illinois Central R. R.*, 203 U. S. 335.

Other cases might be cited which deny public boards, agents and officers immunity from suit. But the principle underlying the decisions is the same. All recognize that the State, as a sovereign, is not subject to suit; that the State cannot be enjoined; and that the State's officers, when sued, cannot be restrained from enforcing the State's laws or be held liable for the consequences flowing from obedience to the State's command.

But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit.

It is said, however, that, in the cases referred to, the of-

ficers were held liable to suit because in the transaction complained of, the statute being unconstitutional, they could not be treated as agents of the State. And it is argued that these authorities have no application to suits against those public corporations which exist, and can act, in no other capacity than as governmental agencies, or political subdivisions of the State itself. But neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty. In *County of Lincoln* v. *Luning*, 133 U. S. 529, 530, the court said that: "While a county is territorially a part of the State, yet politically it is also a corporation, created by and with such powers as are given to it by the State. In this respect it is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part." The court there held that the Eleventh Amendment was limited to those cases in which the State is the real party, or party on the record, but that counties were corporations which might be sued. *Dunn* v. *University of Oregon*, 9 Oregon, 357, 362; *Herr* v. *Kentucky Lunatic Asylum*, 97 Kentucky, 458, 463; *S. C.*, 28 L. R. A. 394.

Corporate agents or individual officers of the State stand in no better position than officers of the General Government, and as to them it has often been held that: "The exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person, whose rights of property they have wrongfully invaded or injured, even by authority of the United States." *Belknap* v. *Schild*, 161 U. S. 10, 18.

Undoubtedly counties, cities, townships and similar bodies politic often have a defense which relieves them from responsibility where a private corporation would be liable. But they must at least make that defense. They

cannot rely on freedom from accountability as could a State.

In this case there is no question of corporate existence and no claim that building the dyke was *ultra vires*. Plaintiff was denied a hearing, not on the ground that his complaint did not set out a cause of action, but solely for the reason that even if the College did destroy his farm, the court had no jurisdiction over a public agent.

If the State had in so many words granted the College authority to take or damage the plaintiff's property for its corporate advantage without compensation, the Constitution would have substituted liability for the attempted exemption. But the State of South Carolina passed no such act and attempted to grant no such immunity from suit as is claimed by the College. On the contrary, the statute created an entity, a corporation, a juristic person, whose right to hold and use property was coupled with the provision that it might sue and be sued, plead and be impleaded, in its corporate name.

Reference is made, however, to *Kansas ex rel. Little* v. *University of Kansas*, and the note to 29 L. R. A. 378, where state colleges, prison boards, lunatic asylums and other public institutions have been held to be agents of the State not liable to suit unless expressly made so by statute.

But an examination of the cases cited, in any respect similar to this, will show that they involve questions of liability in a suit, rather than immunity from suit. Most of them were actions for torts committed, not by the public corporation itself, but by officers of the law. These public corporations were held free from liability in the suit, on the same ground that municipalities are held not to be responsible for the negligence of policemen, jailers, prison guards, firemen, and other agents performing governmental duties. *Workman* v. *Mayor of N. Y.*, 179 U. S. 556. That general rule is of force in South Carolina, as

appears from *Gibbs* v. *Beaufort*, 20 S. Car. 213, 218, cited in the opinion of the court below, where it was said that "a municipal corporation, instituted for the purpose of assisting a State in the conduct of local self government, is not liable to be sued in an action of tort for nonfeasance or misfeasance of its officers in regard to their public duties, unless expressly made so by statute." But the plaintiff is not seeking here to hold the College liable for the nonfeasance or misfeasance either of its own officers or officers of the public. This is a suit against the College itself for its own corporate act in building a dyke, whereby the channel had been narrowed, the swift current had been diverted from the usual course across the plaintiff's farm, and, as it is alleged, destroying the banks, washing away the soil and for all practical purposes as effectually depriving him of his property as if there had been a physical taking. Compare Lewis on Eminent Domain, 2d ed., § 67; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; *Chicago &c.* v. *Chicago*, 166 U. S. 226; Farnham on Waters, § 191; *Conniff* v. *San Francisco*, 67 California, 45, 50.

Again, and still treating the question as though involved in the plea to the jurisdiction, this is not an action against the College for a tort committed in the prosecution of any governmental function. The fee was in the State, but the corporation, as equitable owner, was in possession, use and enjoyment of the property. For protecting the bottom land the College, for its own corporate purposes and advantage, constructed the dyke. In so doing it was not acting in any governmental capacity. The embankment was in law similar to one which might have been built for private purposes by the plaintiff on the other side of the river. If he had there constructed a dyke to protect his farm, and in so doing had taken or damaged the land of the College, he could have been sued

and held liable. In the same way, and on similar principles of justice and legal liability, the College is responsible to him if, for its own benefit and for protecting land which it held and used, it built a dyke which resulted in taking or damaging the plaintiff's farm. 2 Dillon M. Corp. (4th ed.), § 966, p. 1180.

As a part of its plea to the jurisdiction, the College also claimed that "it never had any interest or title in the land described in the complaint, or in any other property connected with the establishment and maintenance of Clemson Agricultural College of South Carolina, all of it being the property of the State of South Carolina." And it is argued that the court could take no jurisdiction of a case against a public corporation which, at most, could only result in a judgment unenforceable by levy and sale under execution.

As a matter of fact, the record indicates that besides the State's annual appropriation and the interest on securities held under the residuary clause of Dr. Clemson's will, the College has other sources of income. It appears to own some land in fee simple. The charter authorizes it to receive bequests. So that if the Fort Hill place is not subject to levy and sale, it does not follow that the institution may not now or hereafter own property out of which a judgment in plaintiff's favor could be satisfied. Besides, we have no right to proceed on the theory that if, at the end of the litigation, plaintiff establishes his right to damages, the judgment would not be paid. These suggestions, though made in a plea to the jurisdiction, afford no reason why the College should be granted immunity from suit, when it is claimed that, in violation of the Constitution, it has taken private property for its corporate purposes without compensation.

The plaintiff prayed not only for damages but that the embankment should be removed. The title to the land and everything annexed to the soil is in the State, subject

to the conditions named in the will. The State, therefore, may be a necessary party to any proceeding which seeks to affect the land itself, or to remove any structure thereon which has become a part of the land. If so, and unless it consents to be sued, the court cannot decree the removal of the embankment which forms a part of the State's property. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446. But the prayer for that part of the relief can be stricken out without depriving the court of jurisdiction to hear and determine the question whether Clemson Agricultural College of South Carolina is liable to the plaintiff for its own corporate act in building for its own proprietary and corporate purposes a dyke which it is alleged damaged or took the plaintiff's farm. *Columbia Waterpower Company* v. *Electric Co.*, 43 S. Car. 154, (1), 167, 169. And, if the facts hereafter warrant it, the College may be enjoined against further acts looking to the maintenance or reconstruction of the dyke. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE HARLAN dissents.